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In The Supreme Court of The United States

OCTOBER TERM, [redacted] 1970

HOLLYWOOD BASEBALL ASSOCIATION,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARTHUR E. GORE
Attorney for Petitioner

Of Counsel:

DAVID B. BARTELL

D. S. ANDREASEN
EARL H. THOMPSON
RUSSELL W. GROSSE
JAMES E. O'NEAL

Andreasen, Thompson,
Gore, Grosse & O'Neal
804 Third Street
Oceanside, California 92054

Attorneys.

SUBJECT INDEX

	Page
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	16
APPENDIX A - Original decision and opinion of the Tax Court	17
APPENDIX B - Original decision and opinion of the Court of Appeals for the Ninth Circuit	34
APPENDIX C - Decision and opinion of the Tax Court on remand	37
APPENDIX D - Decision and opinion of the Court of Appeals for the Ninth Circuit on remand	19

TABLE OF AUTHORITIES CITED

	Page
CASES	
Booth Newspapers, Inc. v. United States, 303 F. 2d 916 (Ct. Cl. 1962)	12
Commissioner v. Bilder, 369 U.S. 499	15
Commissioner v. Gillette Motor Co., 364 U.S. 130 (1960)	13, 14
Corn Products Refining Co. v. Commissioner, 350 U.S. 46 (1955)	2, 7, 9, 10, 11, 12, 13, 14, 15
Deltide Fishing & Rental Tools, Inc. v. United States, 279 F. Supp. 661 (E.D. LA. 1968)	11
E. I. Du Pont De Nemours & Co. v. United States, 288 F. 2d 904 (Ct. Cl. 1961)	10
Grant Oil Tool Co. v. United States, 381 F. 2d 389 (Ct. Cl. 1967)	10
Hertz Corporation v. United States, 364 U.S. 122 (1960)	9
Hillard v. Commissioner, 281 F. 2d 279 (C.A. 5, 1960)	8, 9, 10

TABLE OF AUTHORITIES CITED (Continued)

	Page
CASES (Continued)	
Hollywood Baseball Assn. v. Commissioner, 383 U.S. 824 (1966)	7
Malat v. Riddle, 383 U.S. 569 (1966)	7, 11, 13, 14
Mansfield Journal Co. v. Commissioner, 274 F.2d 284 (6 Cir. 1960)	12
Massey Motors, Inc. v. United States, 364 U.S. 92 (1960)	9
Municipal Bond Corporation v. Commissioner, 341 F.2d 683 (C.A. 8, 1965)	10
Philadelphia Quartz Co. v. United States, 374 F.2d 512 (Ct. Cl. 1967)	10
Philber Equipment Corp. v. Commissioner, 237 F.2d 129 (C.A. 3, 1956)	9, 10
Shapiro v. United States, 335 U.S. 1	15
The Colony Inc. v. Commissioner, 357 U.S. 28	15

TABLE OF AUTHORITIES CITED (Continued)

	Page
STATUTES	
Internal Revenue Code of 1954	
Sec. 337 (26 U.S.C. 1958 ed., Sec. 337)	2, 3, 6, 7, 14, 15
Sec. 1221 (26 U.S.C. 1958 ed., Sec. 1221)	4, 14
Sec. 1231 (26 U.S.C. 1958 ed., Sec. 1231)	15
Sec. 6213(a) (26 U.S.C. 1958 ed., Sec. 6213(a))	6
United States Code, Title 28	
Sec. 1254 (1)	2
MISCELLANEOUS	
Bernstein, Primarily for Sale: A Semantic Snare, 20 Stan. L. Rev. 1093	11, 12
Merten's Law of Federal Income Taxation Vol. 3B, par. 22.14	12
Webster's Third New International Dictionary	13

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v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HOLLYWOOD BASEBALL ASSOCIATION prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on February 16, 1970.

CITATIONS TO OPINIONS BELOW

The original opinion of the Tax Court, applicable portions printed in Appendix A, is reported in 42 T. C. 234. The original opinion of the Circuit Court of Appeals, printed in Appendix B hereto, is reported in 352 F. 2d 350. The order of the Supreme Court of the United States granting certiorari and reversing and remanding for reconsideration is found in 383 U. S. 824. The opinion of the Tax Court on remand, printed in Appendix C, is found in 49 T. C. 338. The opinion of the Circuit Court of Appeals, printed in Appendix D, is reported at ____ F. 2d ____.

JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 1970. The jurisdiction of this court is based on 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the proceeds from the sale of a portion of the taxpayer's baseball team during the course of its liquidation is within the purview of the nonrecognition provisions of Section 337 of the Internal Revenue Code. (26 U. S. C. § 337.)

2. Whether the decision of this court in Corn Products Refining Co. v. Commissioner, 350 U. S. 46, is to be expanded to deny the benefits of Section 337 of the Internal Revenue Code (26 U. S. C. § 337) on the gain from sale of a portion of taxpayer's baseball team during the course of its liquidation, where the court below

found that the taxpayer's player contracts were not in fact held "principally" for sale to customers, Appendix D, p. 2, that the player contracts were subject to depreciation, Appendix D, pp. 2 and 5, and where there was no finding that the taxpayer held any property primarily for sale.

STATUTES INVOLVED

INTERNAL REVENUE CODE OF 1954:

> SEC. 337. GAIN OR LOSS ON SALES OR EXCHANGES IN CONNECTION WITH CERTAIN LIQUIDATIONS.
>
> (a) General Rule. -If-
>
> (1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and
>
> (2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.
>
> (b) Property Defined.
>
> (1) In general - For purposes of subsection (a), the term "property" does not include -
>
> (A) stock in trade of the corporation,

or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year, and property held by the corporation primarily for sale to customers in the ordinary course of its trade or business.

* * * * *

(26 U.S.C. 337)

SEC. 1221. CAPITAL ASSET DEFINED

For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his or business), but does not include --

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

* * * * *

(26 U.S.C. 1221)

SEC. 1231. PROPERTY USED IN THE TRADE OR BUSINESS AND INVOLUNTARY CONVERSIONS.

* * * * *

(b) Definition of Property Used in the Trade Business -- For purposes of this section --

(1) General Rule. -- The term "property used in trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in Section 167, held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not--

(A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year,

(B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or

* * * * *

(26 U.S.C. 1231)

STATEMENT

This is a Federal income tax case and the Tax Court's jurisdiction was based upon Section 6213(a) of the Internal Revenue Code of 1954 (26 U.S.C. § 6213(a)).

Petitioner, HOLLYWOOD BASEBALL ASSOCIATION, was a corporation organized under the laws of the State of California, and operated a professional baseball team in Los Angeles, California, as a member of the Pacific Coast League. During October of 1957, the National League, at the request of the Dodgers and Giants baseball clubs, served notice of its intention to acquire the territories of Los Angeles and San Francisco as National League territory, thus excluding the taxpayer from further playing of professional baseball in Los Angeles, California. As a result of this action, the taxpayer decided to dissolve, and on December 17, 1957, taxpayer's stockholders adopted and assented to a plan of complete liquidation. Within the twelve-month period, beginning on the date of the adoption of such plan, all of the assets of the corporation were distributed in complete liquidation.

The taxpayer reported the gain from the sale of its team (consisting of 36 player contracts) as consummated during the twelve-month period following the adoption of the plan of complete liquidation and as nontaxable income under the provisions of Section 337 of the Internal Revenue Code of 1954. The Commissioner of Internal Revenue contested the applicability of the nonrecognition provision of Section 337 to the gain on the sale of the taxpayer's eight best player contracts and contended that player contracts were held primarily for sale to customers in the ordinary course of the taxpayer's business and were therefore excluded from the nonrecognition

provisions of Section 337 by Section 337(b)(1)(a). The Commissioner's argument against the taxpayer's non-taxable treatment of the sale of the remainder of the team, twenty-eight players, was conceded by the Commissioner in his Tax Court brief.

In its original decision, the Tax Court, 42 T.C. 234, defining primary as "substantial" or "essential", found a holding primarily for sale. The Court of Appeals for the Ninth Circuit affirmed the Tax Court decision, 352 F.2d 350, and this court granted certiorari and reversed and remanded for reconsideration in light of Malat v. Riddell (1966) 383 U.S. 569, Hollywood Baseball Association v. Commissioner (1966) 383 U.S. 821.

The Tax Court on remand found that Hollywood's player contracts were stock in trade held primarily for sale to customers in the ordinary course of business. However, as the Court of Appeals found, Appendix D, pp. 1 and 2, the Tax Court's opinion is based on a legal conclusion that the player contracts "were an integral part of, and at the heart and core of the petitioner's business." As the Court of Appeals further found, Appendix D, pp. 2 and 5, the Tax Court's decision is not based on Malat v. Riddle, supra, as directed by this court on remand, but upon Corn Products Refining Co. v. Commissioner (1955) 350 U.S. 46, and purports to merge the "primarily" test of Malat, supra, with the "integrally" test of Corn Products, supra.

The Court of Appeals affirmed the decision of the Tax Court on remand on the rationale of Corn Products Refining Co. v. Commissioner, supra; and not on Malat v. Riddle, supra, as directed by this court on remand. The Court of Appeals found that the primary reason for the taxpayer's existence was to make money

playing baseball games and selling tickets to the games and made an analogy of the baseball players to "buildings, machinery and employees." Appendix D, p. 2. The Court of Appeals further held the player contracts in question were depreciable assets and the taxpayer hoped that it could keep its best players. Appendix D, pp. 2 and 5. The Court of Appeals further found that taxpayer's baseball player contracts were not held principally for sale, Appendix D, p. 2, but concluded that they were in effect the "raw materials" or "stock in trade" of the taxpayer's business, Appendix D, p. 15, even though it inconsistently found that the taxpayer's principal reason for existence was using the players to make money playing baseball games not selling players, that the taxpayer hoped to keep its best players, and had compared the players to buildings, machinery and employees as referred to above.

REASONS FOR GRANTING THE WRIT

1. The lower court's decision creates a direct irreconcilable conflict among the lower Appellate Courts with the Ninth Circuit on one side and the Third, Fifth and Eighth, and possible the Court of Claims, on the other. The instant case involved the sale by the taxpayer during the course of liquidation of a portion of its team, its eight best players. The taxpayer in the course of developing a first class minor league team had in prior years acquired player contracts, trained and developed players, sold and otherwise disposed of player contracts. The factual situation involved in maintaining a baseball team to produce entertainment for the public at a profit is analogous to the situation involved in maintaining a fleet of trucks or other rental equipment for rent to the public. The Fifth Circuit in Hillard v. Commissioner,

281 F. 2d 279 (C. A. 5, 1960) involving sale of trucks and automobiles after a rental period, held that such sales were only an incident of leasing and not the business itself. The court there further pointed out that the profit on the sales was the result of deduction of cost in prior years through excessive depreciation allowed by the Commissioner of Internal Revenue and cited this court's opinion in Massey Motors, Inc. v. United States, 364 U. S. 92 (1960) and Hertz Corporation v. United States, 364 U. S. 122 (1960), where this court allowed capital gains but adjusted depreciation and did not apply the Corn Products doctrine.

The Third Circuit in Philber Equipment Corporation v. Commissioner, 237 F. 2d 129 (C. A. 3, 1956) involving facts similar to Hillard v. Commissioner, supra; found that although the taxpayer knew when the equipment was acquired that it would probably be sold at the expiration of the one-year leases, the sales were an unavoidable consequence of conditions existing in the business and the sale factor was not a dominating purpose. The decision case at bar is clearly in direct conflict with the above cases where here the Appellate Court found that the peculiar rules of baseball required that it make its players available for sale in order to operate its business and that the taxpayer hoped that it could keep its best players, Appendix D, p. 2.

The court below attempts to distinguish these cases on the fact that these decisions were based on the phrase "primarily held for sale, etc.", however, it is obvious that Corn Products was considered and that such an expansion of the doctrine was rejected since the dissent in Hillard v. Commissioner, supra, a portion of which is quoted by the court below in its opinion, was based on applying Corn Products.

The court below further attempts to distinguish the above cases in that the sales activities there were merely part of the last cycle in the use of capital goods no longer usable in the business itself. The same is true in the case at hand where under the working agreements required to engage in minor league baseball, the end of the natural cycle was the release of the player or a sale to a lower class league in the case of an untalented player or a sale to the major league of a talented player after which the player normally could no longer be used in the minor league which was the taxpayer's business without being subject to draft by a major league. Further, in the case at hand the sale in question of the taxpayer's principal income-producing asset was prompted by liquidation of the taxpayer's corporation. Of course, the player could still play baseball in the major league, or in some instances in the minor league if returned by the major league subject to draft by the major leagues, just as the trucks and equipment in Hillard and Philber could be rented in a used rental operation or for other purposes. The fact that some talented players appreciated in value and were taken by major leagues while others depreciated in value and were released or sold at a loss does not distinguish the cases.

The Eighth Circuit in Municipal Bond Corporation v. Commissioner 341 F. 2d 683 (C. A. 8, 1965), refused to expand the Corn Products doctrine and the "integral" test although the Tax Court had based its alternate grounds for decision on Corn Products. See also Dupont de Nemours & Co. v. Unites States (Ct. Cl. 1961) 228 F. 2d 904; Philadelphia Quartz Co. v. United States (Ct. Cl. 1967) 374 F. 2d 512; Grant Oil Tool Co. v. United States (Ct. Cl. 1967) 381 F. 2d 389, where the Court of Claims refused to expand the Corn Products doctrine. The court below cites

Deltide Fishing & Rental Tools, Inc. v. United States (E.D. LA. 1968) 279 F. Supp. 661, which was not appealed by the government, as the only case to confront squarely the question of applicability of Corn Products to depreciable property and then specifically disagrees with that decision.

2. A further reason for granting certiorari is that the court below has misconstrued this court's decision in Corn Products Refining Co. v. Commissioner, supra, has not applied Malat v. Riddle, supra, as directed by this court on remand, and has created a conflict on an important principle of tax law which appeared to be settled but is now in conflict and should be settled by this court to prevent a continuing problem of substantial importance in the administration of tax laws and to prevent widespread litigation.

A recent article, Bernstein, Primarily for Sale: A Semantic Snare, 20 Stan. L. Rev. 1093 (1968), argues persuasively:

* * * * *

> "Clearly, however, Corn Products cannot be extended to all property that is an 'integral' part of the business. If it were, even the disposal of obsolete plant equipment would yield ordinary income taxation, a result that Section 1231 was specifically enacted to prevent. Corn Products represents judicial indifference to statutory language. Courts therefore are apt to be reluctant to broaden its scope. It is not unlikely they will continue to confine it to situations analogous to its own

> facts: namely, transactions outside the ordinary course of business that serve a special function of protecting or preserving some asset (usually inventory) used in the normal course of its business. Despite efforts by the Government, the Corn Products doctrine has not been extended to sales of depreciable property." (Citations.)

* * * * *

Although this court's decision in Corn Products, supra, involved futures to protect the taxpayer's raw material inventory supply, the court below would expand the Corn Products doctrine to transactions that serve the function of preserving depreciable property, Appendix B, p. 8. Further, the court below does not recognize the tie-in between the item in question and the taxpayer's inventory or property held primarily for sale as pointed out in Bernstein, 20 Stan. L. Rev. 1093, supra, and Merten's Law of Federal Income Taxation, vol. 3 B, par. 22.14, which states that where the Corn Products case has been applied, "A thread that runs through all cases is that there must be a direct relationship between the product that is the basis of the taxpayer's business and the commodity future in which he deals for protection."

The court below attempts to distinguish such cases as Mansfield Journal Co. v. Commissioner, 274 F. 2d 284 (6 Cir. 1960), and Booth Newspaper, Inc. v. United States, 303 F. 2d 916 (Ct. Cl. 1962), as examples of cases where Corn Products was applied without an inventory "tie-in" and stated that the contracts there were entered into to assure a supply of raw materials and had

nothing to do with inventory or property held primarily for sale and that there the taxpayers were selling newspapers not news print. The two cases, however, when considered with the true definition of inventory in mind do show an inventory "tie-in" and come directly within this court's decision in Corn Products where the commodity future was also acquired to protect the supply of raw materials. Further, in Corn Products the taxpayer was selling corn products not corn which was its raw material inventory that became part of the finished corn product just as the news print raw materials inventory became part of the newspapers finally sold.

The court below has confused the terms "raw materials" and "inventory". Inventory is a generic term which includes various types of inventories such as raw materials inventory, work in process inventory and finished goods inventory. Webster's Third New International Dictionary defines inventory as, inter alia, "A list or schedule of raw materials, supplies, work in process and finished goods on hand at a particular date". The court below, however, finds the player contracts in question depreciable property, Appendix D, pp. 2 and 5, and also, in effect, the "raw materials" or "stock in trade", Appendix D, p. 15, but not inventory held primarily for sale, Appendix D, p. 2, relying on Corn Products Refining Co. v. Commissioner, supra.

The court below has ignored the comparison which the court made in Malat v. Riddell (1966) 383 U.S. 569, between Corn Products Refining Co. v. Commissioner (1955) 350 U.S. 46 and Commissioner v. Gillette Motor Co. (1960) 364 U.S. 130. The eight players here involved were purchased for $22,150.00 and sold for $117,000.00, an appreciation in value unrealistically high for the raw materials or stock in trade as the court

below found the player contracts to be. Such appreciation in value is entitled to the relief provided by statute as held by this court in Commissioner v. Gillette Motor Co., supra, and pointed out in Malat v. Riddell, supra.

3. A final reason for granting the writ of certiorari is that this case involves an important question of statutory construction and the time is ripe for this court to reexamine its decision in Corn Products Refining Co. v. Commissioner, supra.

Section 337 and Section 1221 of the Internal Revenue Code both refer to "stock in trade" or other property of a kind which would properly be included in inventory and property held primarily for sale. Section 1231 of the Internal Revenue Code is similar. The lower court's holding player contracts to be in effect raw materials or stock in trade is entirely inconsistent with its comparison of player contracts to buildings, machinery and employees, holding that the player contracts were not held "principally" for sale and that it hoped to keep its players. Such assets constituted the principal income-producing assets of the taxpayer and were certainly not stock in trade or property of a kind which would properly be included in inventory under the rules of statutory interpretation adopted by this court. The court below has misconstrued the word "integrally" as used by this court in connection with inventories in Corn Products Refining Co. v. United States, supra, and misadvisedly used the word to accomplish this inconsistent result where there was no inventory or property held primarily for sale. Of course, the taxpayer's baseball team was an integral part of its business as was its franchise, its leases, its floodlights and other income-producing property. The statute clearly refers to stock in trade of the type normally included in inventory and adds property

held primarily for sale to include such items as real estate which is normally not included in inventory. In the case at hand the court below found no property owned by the taxpayer which would be includible in inventory or held primarily for sale as required by the statute or to be integrally connected with as required by the Corn Products doctrine.

The decision of the court below would give the Commissioner of Internal Revenue a weapon that could have the effect of writing Section 1231 and Section 337 out of the Internal Revenue Code where short life rental equipment, auto rentals, dairy herds, breeding herds, racing stables or baseball teams are maintained through frequent purchases and sales, although not everyday sales as is the case in inventories.

The decision below would enable the Commissioner of Internal Revenue to apply a broadsword attack in every such case and result in widespread litigation which only this court can prevent by establishing a uniform rule and bringing uniformity of decision among the federal courts.

The question involves an important question of statutory construction, Shapiro v. United States, 335 U.S. 1, 4, and there is a pressing need for a uniform rule on this point. Commissioner v. Bilder, 369 U.S. 499, 501. Moreover, the terms and principles involved are still in the statutes and the issue remains one of importance in the administration of the tax laws, not only for earlier years, but for current and future taxable years. The Colony, Inc. v. Commissioner, 357 U.S. 28, 32.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

ARTHUR F. GORE

Attorney for Petitioner

D. S. ANDREASEN
EARL H. THOMPSON
RUSSELL W. GROSSE
JAMES E. O'NEAL

Attorneys

Of Counsel:

DAVID B. BARTELL

Andreasen, Thompson, Gore, Grosse
& O'Neal
804 Third Street
Oceanside, California 92054

APPENDIX A

HOLLYWOOD BASEBALL ASSOCIATION, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 93647. Filed April 21, 1964.

The Brooklyn Dodgers and New York Giants of the major National League transferred their baseball organizations to the Los Angeles and San Francisco areas prior to the commencement of the 1958 professional baseball season. These areas had formerly been controlled by the minor Pacific Coast League. As a result of the transfer, the Pacific Coast League Hollywood Stars baseball organization adopted a plan of liquidation pursuant to section 337, I.R.C. 1954. *Held:*

1. Payments for the nonbulk sale of certain baseball player contracts are not within the purview of section 337;

2. Consideration for the sale of certain property rights flowing from the system of organized professional baseball is within the intendment of section 337; and

3. Organizational expenses determined.

Arthur E. Gore, for the petitioner.

Douglas W. Argue and *Lawrence S. Kartiganer*, for the respondent.

FORRESTER, *Judge:* Respondent has determined deficiencies of $25,502.07, $20,004.38, and $8,760.08 for the taxable years ending October 31, 1955, October 31, 1956, and October 31, 1958,[1] respectively. The three remaining issues before us are as follows:

(1) Whether gain realized from the sale of certain baseball player contracts is within the purview of section 337;

(2) Whether an amount realized pursuant to the transfer of two major league baseball teams to the Pacific coast area is taxable as ordinary income to petitioner; and

(3) Whether the petitioner is entitled to a claimed deduction for organizational expenses.

[1] Respondent, in an amended answer, asserts an additional deficiency of $102,284 for the taxable year ending Oct. 31, 1958, pursuant to sec. 6214(a), I.R.C. 1954. Unless otherwise noted, all Code references are to the I.R.C. of 1954.

Some of the facts have been stipulated and are so found.

Petitioner, Hollywood Baseball Association, was a corporation organized under the laws of the State of California on December 8, 1938. From December 8, 1938, to December 13, 1946, petitioner was known as Hollywood Baseball Investment Co. (hereinafter sometimes called Investment).

Another corporation, Hollywood Baseball Association, a California corporation (not the petitioner herein, and hereinafter sometimes called Association), was organized on December 18, 1937. This corporation was formed for the purpose of acquiring, owning, and operating a professional baseball team in the Pacific Coast Baseball League (hereinafter called P.C.L.). All of the stock of this corporation was owned, from its inception, by Mission Baseball Association, a California corporation.

As of December 1, 1938, Investment purchased all of the stock of Association from Mission Baseball Association for $40,000.

On June 13, 1946, Association filed a certificate of election to dissolve with the secretary of state of California. On December 16, 1946, it filed a certificate of dissolution with the secretary of state of California. Pursuant to the certificate of election to dissolve, all of its assets and liabilities were transferred to petitioner, its sole stockholder, on December 11, 1946. On December 13, 1946, there was filed with the secretary of state of California, a consent of the shareholders of petitioner to change petitioner's name from Hollywood Baseball Investment Co. to Hollywood Baseball Association. On and after December 13, 1946, petitioner was known as Hollywood Baseball Association.

During and prior to the fiscal years here in issue, petitioner operated under the name of the Hollywood Stars as a member club of the P.C.L.

On December 17, 1957, petitioner's stockholders adopted and assented to a plan of complete liquidation.

On its tax return for the fiscal period ended October 31, 1958, petitioner reported the following as items of nontaxable income:

SCHEDULE 1.—INCOME NONTAXABLE UNDER SECTION 337 OF THE INTERNAL REVENUE CODE AND SECTION 10,352(E) OF CALIFORNIA REVENUE AND TAXATION CODE

Item	Date of sale	Income
Sale of equipment (fully depr.)	Dec. 18, 1957	$5,000
Sale of field lights (fully depr.)	Feb. 28, 1958	5,000
P.C.L. sale of franchise rights	Jan. 27, 1958	150,000
Sale of player contracts	Mar. 28, 1958	117,000
Sale of franchise	Dec. 18, 1957	100,000
Total nontaxable income		377,000
Less original cost of franchise rights		150,000
Net nontaxable income		227,000

Findings of Fact as to Issue 1. Regarding Whether Amounts Received For the Sale of Certain Baseball Player Contracts Are Within the Purview of Section 337

By documents entitled "Uniform Agreement for the Assignment of a Player's Contract to or by a Major League Club" and dated October 1, 1957, petitioner assigned the contracts of two baseball players to the Pittsburgh Athletic Co., Inc. (hereinafter called Pittsburgh). The following stated conditions were contained in each of the two agreements:

> *Conditionally:* For and in consideration of the sum of $70,000.00 (Seventy Thousand Dollars) of which $25,000.00 (Twenty-Five Thousand Dollars) is payable upon execution of this agreement and the balance of $45,000.00 (Forty-Five Thousand Dollars) is payable if player is retained by Pittsburgh on April 1, 1958.

Petitioner received $25,000 for each player contract and included this total sum of $50,000 in its income tax return for the fiscal period ended October 31, 1957. The cost of the two player contracts to petitioner was $4,500, which amount had been previously deducted by petitioner as an item of current expense offsetting current income for Federal income tax reporting purposes. The remaining $90,000, or $45,000 per contract, was reported by petitioner on its Federal income tax return for the period ended October 31, 1958, as nontaxable income under section 337.

By documents entitled "Official Agreement for Outright or Conditional Assignment" and dated January 3, 10, and 11, 1958, petitioner assigned the contracts of six baseball players to the Columbus Baseball Club of the International League. These have been treated as sales to Pittsburgh, which was connected with the stated buyer. The three agreements, each involving two player contracts, involved the assignment of other player contracts to petitioner and also a total of $27,000 as consideration flowing to petitioner. The cost of the six player contracts to petitioner was $17,650, which amount had been previously deducted by petitioner as an item of current expense offsetting current income for Federal income tax reporting purposes. The $27,000 was reported by petitioner on its Federal income tax return for the period ended October 31, 1958, as nontaxable income under section 337.

The world of professional baseball, made up of major and minor professional baseball leagues and their constituent clubs, is governed by a detailed set of agreements, rules, and regulations, most or all of which are codified in an annual publication entitled "The Baseball Blue Book." The parties stipulated relevant portions of the Baseball Blue Book for 1957. These provisions may be summarized in the following manner:

(a) Major league agreement—An agreement between the National and American Leagues of professional baseball (hereinafter sometimes called the major leagues) and their [then] 16 constituent clubs;

(b) Major league rules—A set of rules formulated pursuant to the major league agreement covering the operation of and relations between the National and American major leagues;

(c) Professional baseball agreement—An agreement between the National and American major leagues and the National Association of Professional Baseball Leagues (hereinafter sometimes called the minor leagues);

(d) Major League-National Association rules (hereinafter sometimes called M.L.–N.A. rules)—A set of rules formulated pursuant to the professional baseball agreement covering operations and relations between the major and minor leagues.

(e) National association agreement—An agreement and rules covering the operations of and relations between the various minor leagues and their minor league member clubs.

Under the rules of organized professional baseball, the purchase and sale of player contracts was regulated and controlled by a series of agreements and regulations governing the operations of and relations between the major and minor leagues. As a party to these agreements the P.C.L. was subject to the rules governing a category known as open classification.

The rules of organized professional baseball established a procedure whereby players of minor league teams could be selected by major league teams (hereinafter sometimes called the "player draft"). The consideration required under these rules for the selection of a player from an open classification league was $15,000. The rules provided, *inter alia*, that:

> For the purpose of enabling players to advance in their profession, the contracts of National Association players shall be subject to selection from clubs holding title thereto by Major League clubs and by National Association clubs of higher classification upon the following conditions:
>
> (a) Players whose contracts have been or hereafter are assigned outright to National Association clubs by Major League clubs shall be subject to selection without restrictions other than the following:
>
> (1) One player's contract only may be selected each year from each Open Classification * * * club, except as hereinafter set forth in (4) below.
>
> * * * * * * *
>
> (4) Any club may designate a player's contract as being subject to unrestricted selection. Selection of any such player's contract shall not preclude selection of the contract of any one other player as set forth in (1) * * * hereof.
>
> (5) Contracts of players who have as Veteran Major League players * * * given written consent to the assignment of their contract to a National Association club, shall be subject to unrestricted selection at any and all selection meetings following such assignment * * *
>
> (b) The contracts of all other players shall be subject to selection of Major League * * * clubs after such players have had the following experience with

a club or clubs of the National Association; service during each of five seasons if reserved by an Open Classification club; * * *

(c) A player shall be considered as having had a "season's service" for the purpose of this rule during any season in which he has been on the active list or otherwise under control of a National Association club or clubs 30 days or more * * *.

(d) Nothing in this rule shall make subject to selection the contract of a player who has waived selection rights under the Professional Baseball Agreement or Rules pursuant to contract with an Open Classification club.

Players on open classification teams had the right to exempt themselves from the player draft. The record does not disclose any player who so acted.

The M.L.–N.A. rules imposed a limit upon the number of players to which major and minor league clubs could hold title. The limitations upon open classification leagues were as follows:

Open Classification * * * clubs shall not have title to more than thirty-eight (38) player contracts at any time, including the contracts of players on the Active List, under reservation, and on optional assignment to other clubs, but excluding the contracts of players on the Voluntarily Retired, Disqualified, Restricted, Ineligible and National Defense Service Lists, which number must be reduced to twenty-four (24) active players by the opening date of the Major League season or of the particular league's own season, whichever is the later; and further reduced to twenty-one (21) active players from the 31st day of the playing season to twenty (20) days before the close of season each year, both inclusive.

The reason for this limitation was stated as follows:

Since the supply of skilled players is not equal to the demand, the Major Leagues shall strictly observe their own rule imposing a limitation upon the number of players on their clubs and the National Association clubs shall likewise be limited * * *.

The Major League-National Association rules provided that a uniform baseball player contract must be used within organized baseball. The relevant rule stated the following:

Uniform Contract. To preserve morale and to produce the similarity of conditions necessary to keen competition, the contracts between all clubs and their players in the Major Leagues shall be in a single form which shall be prescribed by the Major League Executive Council; and the contract between all clubs and players in the National Association shall be in a single form which shall be prescribed by the President of the National Association. No club shall make a contract different from the uniform contract, and no club shall make a contract containing a non-reserve clause except permission be first secured from the Commissioner in case of a Major League player, or from the President of the National Association in case of a National Association player. The making of any agreement between a club and a player not embodied in the contract shall subject both parties to discipline; and no such agreement, whether written or verbal, shall be recognized or enforced.

The uniform baseball player contract usually contained a "reserve clause" which reserved to the employing team the right to renew the employment for a succeeding year, subject to salary renegotiation.

Successive agreement to contracts containing reserve clauses would effect continued control over a player during his playing life. The parties stipulated a copy of a document entitled "Uniform Player Contract" and stipulated that it is representative of the player contract form used by the minor leagues. The following is contained in the uniform player contract:

> On or before March 1 • • • of the year next following the playing season covered by this contract, the Club may notify the Player of its intention to renew this contract, by tendering him a contract for the term of such year, except that the compensation rate shall be such as the parties may then agree upon. • • • In the absence of agreement by the parties, the compensation rate shall be determined as provided • • • [below], but pending such determination the Player will accept the compensation rate fixed by the Club or else will not play otherwise than for the Club.
>
> The Club's right to renew this contract • • • and all covenants, promises and representations of the Player have been taken into consideration in determining the amount payable • • •.
>
> In case of dispute between the Player and the Club • • •, the same shall be referred to • • • [arbitration].

Major and minor league teams sometimes entered into an arrangement called a "working agreement." The M.L.–N.A. rules defined working agreement as follows:

> A club may convey by written agreement to a club of higher classification the right to select the contract, or contracts, of one or more players for a specified consideration which in no event shall be less than $100.00 per contract selected. Such agreements shall be known as "working agreements" and shall be subject to approval by the Commissioner if between a Major League Club and a National Association club and by the President of the National Association if between National Association clubs.
>
> • • • • • • •
>
> Any selection made under working agreements granting the right to make selections of players' contracts must be made on or before October 1st of each year, • • •.
>
> • • • • • • •
>
> Working Agreements which contemplate the selection of player contracts from clubs of Class A or higher, • • • may be entered into upon terms and conditions satisfactory to the clubs concerned, provided that no provision of such agreement shall conflict with • • • [the above].

For the years ended 1949 and 1950, petitioner had a working agreement with the Brooklyn National League Baseball Club, Inc., for which it received $20,000 per year. For the years ended 1951 and 1952, petitioner had a working agreement with Pittsburgh of the national league, for which it received $27,500 per year. For the years ended 1955, 1956, and 1957, petitioner had a working agreement with Pittsburgh for which it received $20,000 per year.

The working agreement dated April 1, 1957, gave Pittsburgh the right to select, under certain conditions, the contracts of any and all players belonging to petitioner. It provided, *inter alia*, the following:

WORKING AGREEMENT

I

For and in consideration of the payment of the sum of $20,000.00 (Twenty Thousand Dollars) by Pittsburgh to Hollywood, Hollywood gives to Pittsburgh the right to select, subject to conditions set forth below, the contracts of any and all players (including the manager, if a player) now under contract or reservation to Hollywood or whose contracts may become the property of Hollywood during the term of this agreement and also the contracts of all players which now are or may become the property of Hollywood-affiliated clubs during the term of this agreement and thereby become selectable or otherwise subject to acquisition by Hollywood, and the consideration for this agreement is at the same time consideration for contracts selected under its provisions except as otherwise specified herein.

(a) In the event of the termination of this agreement, Hollywood will retain title to the contracts of eight (8) players mutually agreeable to both parties or in lieu thereof the sum of ($15,000.00) Fifteen Thousand Dollars shall be paid to Hollywood by Pittsburgh.

(b) As to selections made by Pittsburgh under this agreement, Pittsburgh shall reimburse Hollywood at the time of selection for payments made by Hollywood in originally acquiring the selected players' contracts as free agents (bonuses) or by purchase or selection (draft) from clubs not affiliated with Pittsburgh independent of recommendation by authorized representative of Pittsburgh or other Pittsburgh-affiliated clubs.

(c) If during the term of this agreement authorized representatives of Pittsburgh or other Pittsburgh-affiliated clubs on behalf of Hollywood shall negotiate contracts with free agents providing for the payment of bonuses to such players, it is understood and agreed that Pittsburgh shall promptly reimburse Hollywood for such bonus payments provided that such payments, when payable on a contingent basis, have first been approved by Pittsburgh.

(d) Hollywood during the term of this agreement may not unconditionally release any player or assign outright the contract of any player without first giving Pittsburgh ten (10) days' written or telegraphic notice of its intention to release or assign such player's contract, within which ten (10) day period Pittsburgh may elect to exercise its right to select such contract or waive all right thereto.

II

The right of selection provided for in "I" above is to be exercisable by Pittsburgh on or before October 1, 1957, except as otherwise provided herein, and Hollywood upon receipt of notice of selection immediately shall assign outright to Pittsburgh the contracts of selected players. All players whose contracts are selected under this agreement, however, shall remain with Hollywood until the close of its current season,—including all official post-season games, if any, unless otherwise agreed upon.

III

If during the term of this agreement Hollywood with Pittsburgh's approval shall enter into working agreements with clubs of lower classification, Pittsburgh shall reimburse Hollywood for all expenses incurred by Hollywood under such agreements.

IV

The selection of Hollywood's field manager shall be subject to approval by Pittsburgh (but Hollywood solely shall be responsible for payment of said manager's salary):

V

Hollywood shall train at a site of its own choosing and shall be responsible for all expenses incurred in connection therewith.

VI

This agreement for the 1957 season shall be extended automatically for 1958 on the same conditions and terms as are set forth herein unless notice is given by either party of a desire to terminate this agreement as of October 1, 1957. Notice of such desire to terminate on the part of Hollywood shall be given to Pittsburgh on or before August 1, 1957. Should Pittsburgh desire to terminate the agreement it must notify Hollywood to that effect on or before September 1, 1957.

VII

Pittsburgh agrees not to hold Hollywood liable for damages for failure to operate a baseball team at any time during the life of this agreement.

Although under the stated terms of the working agreement petitioner was only entitled to reimbursement for various costs of acquiring a player's contract, the general practice was that petitioner would be paid the fair market value for the sale of player contracts.[2] During at least 1957, the chairman of the board of directors of Pittsburgh and the chairman of petitioner's board of directors was the same man, Branch Rickey, and Pittsburgh owned approximately 25 percent of petitioner's voting stock. The Baseball Blue Book listed petitioner as "Connected with Pittsburgh."

Petitioner sold a total of 224 player contracts for a total consideration of approximately $799,800 from the year ended 1948 through the

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[2] Robert H. Cobb (hereinafter sometimes called Cobb), former president of petitioner, explained the fact that petitioner received the fair market value for its players under the working agreement as follows:

"Q. Isn't it a fact that only due to the fact that Pittsburgh benevolently or otherwise helped you to survive in effect by purchasing players' contracts from you at high prices, so that you could offset [the] • • • tremendous loss [in 1956 and 1957]?

"A. That may be possible, but they realized and appreciated the cost of developing these players. • • • [I]t takes public relations, but if you happen to work with a club like the Dodgers, for instance, or like Pittsburgh where we had a very close association, they recognized your problem and they wouldn't hold you right to their working agreement."

Similarly, Paul Jeschke, former corporate secretary and business manager of petitioner testified as follows:

"Q. How were you able to obtain sales prices in excess of cost in your negotiations with Pittsburgh?

"A. Well, the working agreement is for a period of one year, and often, in order to assure a renewal in the working agreement, a fair market price of a player would have to be paid rather than the cost. You develop a reputation of being fair with someone, and if you paid the fair price for the ballplayer, your reputation was better, and you were able to get better working agreements."

year ended 1957. During this same period the petitioner purchased a total of 175 player contracts at a total cost of $561,450.

The following schedule reflects, in round figures, for the year ended 1948 through the year ended 1957, the receipts from the sale of player contracts, the number of sales and purchases, and certain expenses, such as the purchase price of player contracts, payments to free agents which were not reimbursed by major league teams holding working agreements with petitioner, net cost of player contract options and National Association commissions: [3]

Fiscal year ending	Revenue from contract sales	Number of sales	Number of purchases	Expenses
1948	$84,500	19	17	$114,900
1949	42,800	26	22	75,400
1950	98,500	18	17	64,600
1951	32,300	21	11	60,800
1952	40,850	14	15	103,800
1953	75,700	13	12	62,700
1954	123,000	35	31	98,900
1955	100,350	23	24	66,100
1956	125,600	88	21	33,400
1957	76,200	17	5	15,500
Total	799,800	224	175	696,100

Petitioner derived receipts from the sale of admissions to baseball games, concession items, advertising, radio and television broadcasting rights, as well as from the sale of baseball player contracts. The following schedule reflects (round figures) for the year ended 1948 through the year ended 1957, the revenues realized from the operations of the petitioner, exclusive of the receipts from player contracts, and the operation's expenses, exclusive of the purchase price of player contracts, net payments to free agents, net cost of player contract options, and National Association commissions:

Fiscal year ending	Revenues	Expenses	Fiscal year ending	Revenues	Expenses
1948	$522,700	$470,200	1954	$728,400	$483,100
1949	670,600	507,400	1955	499,800	441,000
1950	588,100	515,400	1956	397,900	452,900
1951	491,000	482,200	1957	361,600	442,400
1952	498,700	507,800			
1953	485,400	459,100	Totals	5,044,200	4,761,300

[3] Petitioner acquired players through purchase from other teams, the addition of "free agents," who were sometimes paid compensation (termed by petitioner "player bonuses") which compensation was sometimes reimbursed by major league teams holding working agreements with petitioner, minor league working agreements [1954 and 1955 only]; and player contract options. "A National Association commission is a fee paid to the National Association for the assignment of contracts.

Cobb testified as follows regarding expenses other than the cost of acquiring player contracts:

"Q. Of course, all of these expenses * * * are part of your overall baseball operations.

"A. Yes, sir, in the final result, in the final analysis, yes."

From at least the year ended 1948 through the year ended October 31, 1957, it had been the consistent accounting procedure of petitioner to return for Federal income tax reporting purposes the revenue realized from player contract sales as either a part of its gross receipts or as other income from business operations. During these years it was petitioner's consistent accounting practice to deduct as an annual expense for Federal income tax purposes the entire cost of player contracts purchased in each year.

The player contracts at issue were held primarily for sale to customers in the ordinary course of petitioner's business.

* * * * * * * * * * * *

OPINION

Issue 1. Regarding Whether Amounts Received for the Sale of Certain Baseball Player Contracts Are Within the Purview of Section 337

The first issue is whether gain realized by petitioner from the sale of certain baseball player contracts to Pittsburgh is within the nonrecog-

nition provisions of section 337.[4] Respondent contests the application of section 337 on two grounds: He asserts that the player contracts are excluded from section 337 by the terms of section 337(b)(1)(A) and he avers that some of the relevant contracts were sold prior to the adoption of the plan of liquidation. Since we find for the respondent on the first ground we need not consider the latter theory.

Section 337 is a relief provision which is designed to eliminate the difference in corporate tax consequence which formerly depended upon whether a corporation or its shareholder sold a liquidating corporation's assets: S. Rept. No. 1622, 83d Cong., 2d Sess., pp. 258–260 (1954); H. Rept. No. 1337, 83d Cong., 2d Sess., pp. A106–A109 (1954). Cf. *Commissioner* v. *Court Holding Co.*, 324 U.S. 331; *United States* v. *Cumberland Pub. Serv. Co.*, 338 U.S. 451. Gain realized is therefore not recognized at the corporate level if the sale complies with the provisions of section 337.

The limited purpose of providing parity of treatment for unusual sales in liquidation would not be served by granting nonrecognition for gain which is derived from ordinary sales in the ordinary course of a corporation's business. Hence, unless "inventory-type" assets are sold in bulk, gain from property held for sale to customers in the ordinary course of a corporation's business is excluded from the nonrecognition relief. This is accomplished by granting nonrecognition to corporate "property" in section 337(a) and then stating in section 337(b)(1)(A) that:

> the term "property" does not include—
>
> (A) stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year, and property held by the corporation primarily for sale to customers in the ordinary course of its trade or business,

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[4] SEC. 337. GAIN OR LOSS ON SALES OR EXCHANGES IN CONNECTION WITH CERTAIN LIQUIDATIONS.

(a) GENERAL RULE.—If—

(1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and

(2) within the 12 month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims,

then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

(b) PROPERTY DEFINED.—

(1) IN GENERAL.—For purposes of subsection (a), the term "property" does not include—

(A) stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year, and property held by the corporation primarily for sale to customers in the ordinary course of its trade or business, • • •

• • • • • • • • •

(2) NONRECOGNITION WITH RESPECT TO INVENTORY IN CERTAIN CASES.—Notwithstanding paragraph (1) of this subsection, if substantially all of the property described in subparagraph (A) of such paragraph (1) which is attributable to a trade or business of the corporation is, in accordance with this section, sold or exchanged to one person in one transaction, then for purposes of subsection (a) the term "property" includes

(A) such property so sold or exchanged, • • •.

This exclusion of "inventory-type" assets has its counterpart in section 1221(1)[8] which creates an exclusion from capital gains treatment by the use of words which are essentially identical to those contained in section 337(b)(1)(A). The only differences are the section 337 utilization of the specific "corporation" rather than the generic "taxpayer" and the use of the conjunction "and" rather than "or." Since section 337 is by its terms limited to corporations, the difference between "corporation" and "taxpayer" is of no significance; nor is the use of the conjunction "and" for "or." The essential identity of terms is matched by the similarity of purpose. Section 1221(1) excludes certain matter from a relief provision because Congress intended that profits and losses resulting from the sale of "inventory-type" assets should not be granted capital gains treatment. *Rollingswood Corp.* v. *Commissioner*, 190 F. 2d 263 (C.A. 9), affirming a Memorandum Opinion of this Court. Cf. *Corn Products Co.* v. *Commissioner*, 350 U.S. 46. Similarly, section 337(b)(1)(A) excludes essentially identically articulated matter from a relief provision because Congress intended that income from the sale of "inventory-type" assets should not be granted nonrecognition from corporate-level taxation. "It is intended that, during the 12-month period, sales in the ordinary course of business shall result in ordinary gain to the corporation as if the corporation were not in the process of liquidating." S. Rept. No. 1622, 83d Cong., 2d Sess., p. 259 (1954). See also H. Rept. No. 1337, 83d Cong., 2d Sess., pp. A106–A109 (1954). Judicially developed concepts and interpretation regarding section 1221(1) are clearly applicable in analysis of section 337(b)(1)(A). *Jeanese, Inc.* v. *United States*, 227 F. Supp. 304 (N.D. Cal.).

Whether the gain realized from the sale of the relevant baseball player contracts to Pittsburgh pursuant to the working agreement is excluded from section 337 nonrecognition relief by section 337(b)(1)(A) depends upon whether petitioner has sustained its burden of proving that the contracts were not held primarily for sale to customers in the ordinary course of petitioner's business. The purpose for which petitioner held the property is a question of fact which must be determined from the entire record. See *Carlson* v. *Commissioner*, 288 F. 2d 228 (C.A. 7), affirming a Memorandum Opinion of this Court; *Bauschard* v. *Commissioner*, 279 F. 2d 115 (C.A. 6), affirming 31 T.C. 910; *McMillan Mortgage Co.*, 36 T.C. 924; *D. L. Phillips*, 24 T.C. 435; *S.E.C. Corporation* v. *United States*, 140 F. Supp.

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[8] SEC. 1221. CAPITAL ASSET DEFINED.

For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

717 (S.D.N.Y.), affirmed per curiam 241 F. 2d 416 (C.A. 2), certiorari denied 354 U.S. 909.

There are numerous cases which reach factual conclusions in this area, and they mention several criteria as being relevant, including the purpose for which the property was acquired, held and sold, the intent of the seller, and the volume, frequency, continuity, profitability, and substantiality of sales. Unlike many of the other situations, petitioner's purchase and sale of baseball player contracts was essential to its amusement business as well as being a source of profit in its own right, and the factual criteria must be considered in both lights. The ultimate question is whether one of the primary purposes for which petitioner held the relevant property was sale to customers in the ordinary course of business, and no single analytic criterion is necessarily determinative. *Meridian Inc.* v. *Commissioner*, 322 F. 2d 198 (C.A. 6), affirming a Memorandum Opinion of this Court; *Greene-Haldeman* v. *Commissioner*, 282 F. 2d 884 (C.A. 9), affirming 31 T.C. 1286; *Paul K. Ashby*, 37 T.C. 92; *Sally K. Frankenstein*, 31 T.C. 431, affd. 272 F. 2d 135 (C.A. 7), certiorari denied 362 U.S. 918; *S.E.C. Corporation* v. *United States*, *supra*.

Petitioner views our task differently and avers that we must find the major purpose for which the baseball contracts were held. It asks us to determine whether the purpose was to hold baseball player contracts for amusement income or for sale. But we need not choose between purposes since the statute denies nonrecognition to property "primarily" held for sale and it is well established that "primarily" does not necessarily mean "principal" or "chief." The requisite purpose is present if there is an essential or substantial holding for sale. Property may be held for more than one purpose and if one of the dual purposes is sale to customers in the ordinary course of business, the gain thereby derived may fail to qualify for nonrecognition relief. See *Recordak Corporation* v. *United States*, 325 F. 2d 430 (Ct. Cl.); *American Can Co.* v. *Commissioner*, 317 F. 2d 604 (C.A. 2), affirming on this point 37 T.C. 198, certiorari denied 375 U.S. 993; *Greene-Haldeman* v. *Commissioner*, *supra*; *Bauschard* v. *Commissioner*, *supra*; *Rollingwood* v. *Commissioner*, *supra*; *Municipal Bond Corporation*, 41 T.C. 20; *R. E. Moorhead & Son, Inc.*, 40 T.C. 704; *Estate of Peter Finder*, 37 T.C. 111; *Real Estate Corporation*, 35 T.C. 610, affd. 304 F. 2d 423 (C.A. 10), certiorari denied 371 U.S. 822; *Joseph A. Harrah*, 30 T.C. 1236; *S.E.C. Corporation* v. *United States*, *supra*. Congress did not intend to grant nonrecognition to sales in the ordinary course of business. S. Rept. No. 1622, 83d Cong., 2d Sess., pp. 258, 259 (1954).

It is clear, then, that our task is to determine whether at least one of the essential or substantial purposes in holding baseball player contracts was sale to customers in the ordinary course of business. This

determination must be made on the basis of the record before us and with due regard to the petitioner's burden of proof. Petitioner's representatives often stated that they would have preferred to keep players so as to build a winning team. This is not necessarily inconsistent with a dual purpose to sell. In any event, the acme here is not a purpose which petitioner would have had in an unfettered situation; rather it is the purpose it actually had, and this must be found with due regard to the rules, regulations, and practices of organized professional baseball and the working agreements with major league teams that petitioner voluntarily entered into.

As set out in our findings, the rules of organized baseball required that petitioner hold open its player contracts for sale under certain procedures. Major league clubs could purchase any player contract which petitioner had held for 5 seasons (a season's service being defined as 30 days or more in any given year); one player could be drafted each year without restriction as to time of service if the contract had been assigned outright by a major league club; and petitioner could designate any player contract as being subject to unrestricted selection. Although petitioner's players had the right to exempt themselves from the draft, it is significant that the record does not disclose any attempt by petitioner to encourage such action or any player who took such action.

Further, the rules of organized baseball limited petitioner in the number of player contracts to which it could hold title. It could never hold title to more than 38, which number was reduced to 24 by the opening of the season, and which number was further reduced to 21 for the major portion of the season. Petitioner sold on the average of 22 player contracts in each of the years 1948 through 1957, although it could only retain 21 for the major portion of the season, and it similarly purchased on the average of 18 players per year during the same period with players also being acquired otherwise than by purchase.

Most significantly, the petitioner had entered into "working agreements" with major league clubs. During 1955, 1956, and 1957, it was a party to a working agreement with Pittsburgh. The 1957 agreement, for example, gave Pittsburgh:

> the right to select • • • the contracts of any and all players (including the manager, if a player) now under contract or reservation to • • • [petitioner] or whose contracts may become the property of • • • [petitioner] during the term of this agreement and also the contracts of all players which now are or may become the property of • • • [petitioner] affiliated clubs during the term of this agreement and thereby become selectable or otherwise subject to acquisition by • • • [petitioner] • • •.

Hence the working agreements provided petitioner with a ready outlet and customer for the sale of its player contracts. Rather than

restrict the sale of its player contracts to the extent allowable under the rules of organized baseball, it contracted for consideration to sell any and all contract Pittsburgh might desire. It received the fair market value for those that it sold to Pittsburgh, in addition to the $20,000 or more it received per year for the entering into the working agreement. The close connection between supplier and customer is emphasized by the fact that the chairman of the board of directors of petitioner was also the chairman of the board of directors of Pittsburgh. The record is inadequate regarding other reasons for entering into working agreements. Even if we assume that there were some reasons other than selling player contracts, the clear implication of the arrangement was that a primary purpose in holding the contracts was the sale to customers in the ordinary course of business.

Moreover, there was great volume, frequency, continuity, and substantiality of sales. From 1948 through 1957, petitioner sold 221 player contracts for a total consideration of approximately $800,000. In the fiscal period ended October 31, 1958, petitioner sold an additional eight contracts to Pittsburgh. Other than for 1958, the lowest number of sales per fiscal year was 13, the highest 38, and the average approximately 22.

Further, the petitioner derived a substantial profit from the sale of baseball player contracts. While there is no certain way of allocating expenses to income from the sale of contracts, since petitioner's overall operation was rather integrated, it is clear that a comparison of income to estimated allocable expenses shows a substantial profit. The approximately $100,000 of profit derived from the sale of player contracts during 1948 through 1957 compares quite favorably to the approximately $280,000 in all other profits during the same period. This is especially so when it is noted that the expenses for all other items was approximately seven times that of the estimated expenses for player contracts. Further, $155,000 was received for working agreements, an item intimately related to the sale of contracts. Too, petitioner derived $117,000 from such sales in the fiscal period ended October 1958. Note also that in the last 2 full years, 1956 and 1957, petitioner lost approximately $55,000 and $80,000, respectively, on its operations exclusive of baseball player contract sales. In these same years, petitioner gained approximately $70,000 and $60,000, respectively, from the sale of such contracts. Finally, the petitioner profited from sales of contracts in each of the last 5 years prior to 1958, that is, from 1953 through 1957. In these most relevant years to our determination, petitioner derived over $220,000 in profit from such sales.

It is evident from this record that petitioner is in error when it contends that the baseball player contracts were not essentially and substantially held for sale to customers in the ordinary course of business. We find that "the taxpayer had as one of its primary purposes

the ultimate sale" of the baseball player contracts "to its customers in the ordinary course of its business at the time it acquired the property, and that this intention continued, unaltered, while" the baseball players exhibited for petitioner "until customers purchased them." *Greene-Haldeman* v. *Commissioner*, *supra* at 887.

The legislative purpose of section 337 is a valid consideration regarding the instant issue, and the finding herein is consistent with that legislative purpose. "Equally material to a proper consideration of the question is a recognition of the fundamental objective of the * * * [statute]." *Paul K. Ashby*, *supra* at 97.

The statutory purpose of section 337 is to relieve and eliminate the formalistic difference reflected in *Commissioner* v. *Court Holding Co.*, *supra*, and *United States* v. *Cumberland Pub. Serv. Co.*, *supra*. This was accomplished by creating a parity of tax consequence which rendered immaterial the fact that a corporation sells assets in liquidation, or its shareholders sell assets after liquidation distribution. S. Rept. No. 1622, 83d Cong., 2d Sess., pp. 258–260 (1954). There is absolutely no support in the legislative history or purpose for the proposition that section 337 is intended to provide nonrecognition for what would otherwise be ordinary corporate income derived from normal and usual nonbulk sales of corporate property.

It must be remembered that the petitioner continually reported the receipts from the sale of baseball player contracts as ordinary income and deducted in a single year the costs of such contracts. This practice of the income aspect was consistent with the contracts being held for sale in the ordinary course of business.[6] If nonrecognition were granted to such income, section 337 would be affording tax-free treat-

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[6] This discussion need not be extended further due to our finding that the contracts here were held for sale in the ordinary course of business. We note without comment, however, that the Internal Revenue Service would apply a tax benefit theory to conclude that previously deducted amounts constitute ordinary income on the sale in liquidation of the allocable assets and would thereby deny section 337 nonrecognition. See Rev. Rul. 61-214, 1961-2 C.B. 60. Cf. sec. 1245, adopted Revenue Act of 1962; *Commissioner* v. *South Lake Farms, Inc.*, 324 F. 2d 837 (C.A. 9), affirming 36 T.C. 1027; *Family Record Plan, Inc.* v. *Commissioner*, 309 F. 2d 208 (C.A. 9), affirming 36 T.C. 305, certiorari denied 373 U.S. 910; *Commissioner* v. *Kuckenberg*, 309 F. 2d 202 (C.A. 9), reversing 35 T.C. 473, certiorari denied 373 U.S. 909; *Williamson* v. *United States*, 292 F. 2d 524 (Ct. Cl.); *Floyd* v. *Seofield*, 193 F. 2d 594 (C.A. 5); *Central Building & Loan Association*, 34 T.C. 447; Rev. Rul. 59-308, 1959-2 C.B. 110. Cf. also *West Seattle National Bank of Seattle* v. *Commissioner*, 288 F. 2d. 47 (C.A. 9), affirming 33 T.C. 341.

There may be some question regarding petitioner's practice of deducting in a single year the costs of the baseball player contracts, since the relevant contracts may have had a more than 1-year useful life. See and compare *Helvering* v. *Kansas City American Ass'n Baseball Co.*, 75 F. 2d 600 (C.A. 8), affirming a Memorandum Opinion of the Court; *Commissioner* v. *Chicago National League Ball Club*, 74 F. 2d 1010 (C.A. 7), affirming a Memorandum Opinion of the Court; *Commissioner* v. *Pittsburg Athletic Co.*, 72 F. 2d 883 (C.A. 3), affirming 27 B.T.A. 1074; I.T. 4078, 1952-1 C.B. 39; with *Indiana Broadcasting Corporation*, 41 T.C. 793; and *Westinghouse Broadcasting Co.*, 36 T.C. 912, affd. 309 F. 2d 279 (C.A. 3), certiorari denied 372 U.S. 935, and the cases therein cited at pp. 919–924; Rev. Rul. 54-441, 1954-2 C.B. 101. Note also that a question regarding whether salvage value equals or exceeds costs may arise. See *Massey Motors* v. *United States*, 364 U.S. 92; *R. E. Moorhead & Son, Inc.*, 40 T.C. 704, 712–713. We need not here meet the deduction question as it is not in issue.

ment from corporate incomestax based on the insignificant fact that such income was derived within a 12-month period following adoption of a plan of liquidation. Rather than providing a parity of tax consequence in a *Court Holding Co—Cumberland Pub. Serv. Co.* situation, section 337 would be authorizing a pass-through of corporate ordinary income without corporate taxation. The relevant transactions were ordinary income sales to Pittsburgh pursuant to a working agreement, not extraordinary sales in liquidation. The purpose of section 337 would be offended by allowing nonrecognition in the instant case.[7]

Further, the reasoning of the Supreme Court in *Corn Products Co. v. Commissioner*, *supra*, is relevant. The Court held that hedging transactions were not to be afforded capital gains treatment because they constituted an integral part of the taxpayer's regular business. The inherent connection with regular business was determinative, since the Court reasoned that Congress did not intend that profits and losses from everyday business operations should be within the purview of the relief capital gains provisions. See also *Booth Newspapers, Inc. v. United States*, 303 F. 2d 916 (Ct. Cl.); *Hallcraft Homes, Inc.*, 40 T.C. 199; *McMillan Mortgage Co.*, *supra*, and the cases therein cited; *Mansfield Journal Co.*, 31 T.C. 902, aff'd. 274 F. 2d 284 (C.A. 6); *America-Southeast Asia Co.*, 26 T.C. 198. This reasoning is applicable to the instant case, since the profitable sale of baseball player contracts was clearly an integral, inherent, and substantial part of the petitioner's business. We do not believe that Congress intended that profits arising from the everyday sale of such property should be within the purview of the relief nonrecognition section 337. Indeed, the instant case is clearer than *Corn Products Co.*, since we have here found that the relevant property was primarily held for sale to customers in the ordinary course of business within the terms of section 337(b)(1)(A). In *Corn Products Co.*, the Court stated that the property did not come within the corresponding predecessor of section 1221(1) and deemed sufficient in and of itself the inherent connection with the taxpayer's business.

We find for the respondent on this issue.

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[7] "It is intended that, during the 12 month period, sales in the ordinary course of business shall result in ordinary gain to the corporation as if the corporation were not in the process of liquidating. * * * [S. Rept. No. 1622, 83d Cong., 2d Sess., p. 259]

"[The House version of sec. 337 is made] specifically inapplicable to a sale made in the ordinary course of the business of the corporation although such sale occurs after adoption of the plan of partial or complete liquidation. For example, if a corporation engaged in owning and operating filling stations were to liquidate * * *, the continued sale of gasoline to motorists during the course of winding up its business would still be considered to give rise to income taxable at the corporate level. [H. Rept. No. 1337, 83d Cong., 2d Sess., p. A107]"

* * * * * * * * * * * * *

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
vs.
HOLLYWOOD BASEBALL ASSOCIATION,
Respondent.

HOLLYWOOD BASEBALL ASSOCIATION,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 19,718

[November 1, 1965]

On Petition For Review of the Decision of the Tax Court of the United States

Before: BARNES, BROWNING and DUNIWAY, Circuit Judges

BARNES, Circuit Judge:

This is a petition by the Commissioner of Internal Revenue for review of a decision of the Tax Court reversing the Commissioner's finding of a deficiency in taxpayer's returns on one ground; and a cross-petition by taxpayer for review of a decision by the Tax Court sustaining the Commissioner's finding of a deficiency in taxpayer's returns on a second ground.

Jurisdiction of the Tax Court was based upon Section 6213(a) of the Internal Revenue Code of 1954 (26 U.S.C. § 6213(a)), which permits a taxpayer who has received a deficiency notice pursuant to 26 U.S.C. § 6212 to petition the Tax Court for a redetermination of the deficiency within ninety days. This court

has jurisdiction of the petition and cross-petition to review pursuant to Section 7482 of the Internal Revenue Code of 1954 (26 U.S.C. § 7482).

The basic facts are not in dispute, though somewhat complicated. We refer to the Tax Court opinion for a detailed explanation of them. 42 T.C. 234 (1964).

The Commissioner states the nature of the controversy in his petition for review as follows:

> "The taxpayer was a member of the Pacific Coast League which was a professional baseball minor league recognized by the established professional baseball organization. In 1957 two major league teams moved into the territory of the Pacific Coast League and made a payment to the League, as they were required to do under the rules of professional baseball. At the time the taxpayer received its portion of the payment it was in the process of liquidation.
>
> The Tax Court held that the taxpayer had properly not recognized any gain from its portion of the payment, because the payment represented proceeds from the 'sale of property' and the gain was therefore not to be recognized pursuant to section 337 of the 1954 Internal Revenue Code.
>
> The Commissioner contends in this appeal that the evidence clearly shows that the payment was merely in lieu of future profits and therefore did not result from a sale of anything, and in the alternative even if there had been a sale, it was not a sale of property as that term is used in section 337 of the 1954 Internal Revenue Code." (Clk's. Tr. 141-42.)

The taxpayer filed his cross-petition to review a portion of the decision, and states the controversy as follows:

> "On its tax return for the fiscal period ended October 31, 1958, the taxpayer reported the sale of player contracts for the sum of $117,000.00 as non-taxable income under Section 337 of the Internal Revenue Code.
>
> The Tax Court held that the player contracts concerned were held primarily for sale to customers in the ordinary course of the taxpayer's business and excluded from the non-recognition of gain provided by Section 337 by the terms of Section 337(b)(1)(A).

> The taxpayer contends in this appeal that the portion of the decision appealed from herein, is not supported by the evidence and is contrary to law, and that the evidence clearly shows that the player contracts in question were not held primarily for sale to customers in the ordinary course of the taxpayer's business, but on the contrary were developed at great expense primarily for the purpose of playing baseball and developing a major league team and, when sold, were generally sold at a loss when all of the expense of acquisition and development of players sold is considered as set forth in the evidence. . . ." (Clk's Tr. 144.)

We are satisfied the Tax Court has correctly decided both matters. We therefore refer to and adopt that portion of the Tax Court's opinion which determined "Issue II" (Tr. pp. 120-32, inclusive; Issue 2 in opinion, 42 T.C. at 264-70, inclusive) and that which was held controlling as to "Issue I" (Tr. pp. 105-20, inclusive; Issue 1 in opinion, 42 T.C. at 256-63, inclusive).

We affirm the decision of the Tax Court under review, both on the issue raised by the petition and those raised by the cross-petition.

APPENDIX C

HOLLYWOOD BASEBALL ASSOCIATION, PETITIONER V. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 93647. Filed January 15, 1968.

It was necessary for petitioner, a minor league baseball club, to enter into working agreements and a league agreement in order to obtain player contracts and participate in organized baseball. Such agreements required sales of such contracts on demand. Held: This entire arrangement was an integral part of, and at the heart and core of petitioner's business; therefore, the player contracts were a part of petitioner's stock in trade and petitioner's primary and principal purpose in holding such contracts was to sell them in the ordinary course of its business. Profits from such sales are to be recognized under sec. 337(b) (1) (A), I. R. C. 1954, Cf. Corn Products Co. v. Commissioner, 350 U.S. 46.

ARTHUR E. GORE, for the petitioner.
MELVIN L. SEARS and ROGER RHODES, for the respondent.

FORRESTER, Judge: This case is before us on remand from the U.S. Court of Appeals for the Ninth Circuit "for fresh fact findings, addressed to the statute [sec. 337(b)(1) (A), I.R.C. 1954][1] as the Supreme

[1] All statutory references are to the Internal Revenue Code of 1954 unless otherwise indicated.

Court has now construed it. See Malat v. Riddell, 383 U.S. 569."

In our original opinion, 42 T.C. 234, filed April 21, 1964, we held, under section 337 (b) (1) (A) of the Internal Revenue Code of 1954, that the petitioner held contracts of professional baseball players "primarily for sale to customers in the ordinary course of its trade or business." At that time we interpreted "primarily" as meaning "essentially" or "substantially" rather than "principally" or "of first importance." Our decision on this issue was subsequently affirmed by the Ninth Circuit (352 F.2d 350, Nov. 1, 1965). Petitioner then filed a petition for writ of certiorari in the Supreme Court of the United States on the issue of the correct construction of the said section of the statute.

On March 21, 1966, the Supreme Court in the case of Malat v. Riddell, 383 U.S. 569, construed section 1221(1) of the Internal Revenue Code which is materially verbatim to section 337(b)(1)(A), and thereafter granted petitioner's petition for writ of certiorari, vacated the judgment of the Court of Appeals, and remanded the case to that court for further consideration in light of Malat v. Riddell. Pursuant to the remand of the Supreme Court, the Ninth Circuit has remanded the case to us.

On motions granted, the parties have filed briefs on this issue without reopening the record.

FINDINGS OF FACT

The facts giving rise to the issue in this case are set out in our original opinion, 42 T.C. at 235-243. There follows a summary of those facts, together with our fresh findings:

Petitioner was a corporation which under the name of Hollywood Stars operated a professional baseball team in the Pacific Coast Baseball League (hereinafter called P. C. L.). On December 17, 1957, its stockholders adopted a plan of complete liquidation.

At the time the plan was adopted petitioner's assets included contracts for the services of professional baseball players. In the year following the adoption of the plan, it consummated the sale of at least six, and possibly eight, of these contracts to the Pittsburgh Athletic Club (hereinafter called Pittsburgh) and to its affiliate, the Columbus Baseball Club. The cost of two of these contracts to petitioner was $4,500. They were sold for a total consideration of $140,000. A total of $27,000 was received for the remaining six contracts which had cost petitioner $17,650.

As we found in our previous opinion, the provisions of a player contract allowed its owner to control a player during his playing life. However, in order to prevent minor league teams such as petitioner's from holding on to a player indefinitely, the P. C. L. and the major leagues entered into an agreement which required petitioner, as a member of the league, to sell each year to any major league team on demand, at least one player contract which had previously been assigned outright to petitioner by a major league team, and to sell the contracts of all players with 5 years or more of service, to any major league team on demand. This arrangement was known as the player draft. (See provisions in detail at pages 237-238 of our prior opinion.)

In addition to the league requirements, petitioner was party to so-called working agreements with major league clubs during relevant years. Its working agree-

ment was with Pittsburgh during 1957 and 1958, and such agreement provided, inter alia, that Pittsburgh could select at any time any player's contract which petitioner owned. Petitioner insists (and we now find), that it was unable to compete with major league teams in recruiting good young players, and unless it had had such an agreement with a major league team, and unless it had agreed to such provisions as this, that it would not have been able to obtain players to field any baseball team, because all the good and potentially good players were owned by major league teams and would be assigned to petitioner only under these conditions.

Two hundred twenty-four player contracts were sold by petitioner from 1948 through its fiscal year ended October 31, 1957, at a substantial overall profit. Detailed facts regarding petitioner's receipts from this source and its receipts from all other sources are found in our prior opinion. In 1956 and 1957 petitioner realized a profit of approximately $150,000 from the sales of such contracts while losing approximately $130,000 on all other activities.

Petitioner's sales of player contracts were made as the direct result of the league rules and the working agreements, and such player contracts were petitioner's stock in trade, held principally for sale to customers in the ordinary course of its trade or business, within the intendment of section 337 as construed by the Supreme Court in Malat v. Riddell, supra.

OPINION

The issue for consideration is whether petitioner's sales of certain player contracts produced income which

is not recognized by if under section 337 of the Code.[2]

Respondent contends that the profits from the sales of the players' contracts are excluded from non-recognition under section 337 (b) (1) (A), and that two of the contracts were in fact sold prior to the adoption of the plan of liquidation. As in our previous opinion in this case, we again find it unnecessary to pass upon respondent's later contention, because we find and hold that such contracts did fall within the exclusion of 337(b) (1) (A).

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[2]SEC. 337. GAIN OR LOSS ON SALES OR EXCHANGES IN CONNECTION WITH CERTAIN LIQUIDATIONS.

(a) General Rule. -If-

(1) a corporation adopts a plan to complete liquidation on or after June 22, 1954, and

(2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

(b) Property Defined. -

(1) In General. - For purposes of subsection (a), the term "property" does not include --

(A) stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year, and property held by the corporation primarily for sale to customers in the ordinary course of its trade or business.

Petitioner's contention is that its primary (principal)purpose (as defined by Malat v. Riddell, supra) for holding player contracts was to further its activity of playing baseball games, winning championships, and thereby drawing customers into the ball parks as paid admissions. It argues that such a purpose is not within the literal language of section 337(b) (1) (A), and contends that therefore those provisions do not apply to exclude its sales of player contracts from nonrecognition.

Under the remand to us we are to consider the facts of this case under section 337 as it has now been construed by the Supreme Court in Malat v. Riddell, supra. At the threshold we note that Malat v. Riddell was dealing with claimed capital gains treatment under the section 1221(1) definition of capital assets, while the instant case involves claimed nonrecognition-of-gain treatment by a corporation under the section 337(b) (1) (A) definition of property. Both sections are relief provisions, their language is substantially identical, and the circumstances of our mandate make it abundantly clear that the two sections are to be construed in an identical manner. Also, cf. Jeanese, Inc. v. United States, 227 F. Supp. 304 (N. D. Cal.)

The Supreme Court in Malat v. Riddell, supra, construed section 1221(1) (and therefore section 337(b) (1) (A)) in the following language:

The purpose of the statutory provision with which we deal is to differentiate between the "profits and losses arising from the everyday operation of a business" on the one hand (Corn Products Refining Co. v. Commissioner of Internal Revenue, 350 U.S. 46, 52) and "the realization of appreciation in value accrued over a substantial period of time" on the other. (Commissioner of Internal Revenue

v. Gillette Motor Transport, Inc., 364 U.S. 130, 134.). A literal reading of the statute is consistent with this legislative purpose. We hold that as used in § 1221(1), "primarily" means "of first importance" or "principally."

Thus the language of the Supreme Court expressly excludes the profits and losses realized from the normal everyday operation of a business from the beneficial treatment allowed by the statute.

Section 337 is a relief provision, designed to eliminate the difference in corporate tax consequences which formerly depended upon whether a corporation or its shareholders sold a liquidating corporation's assets. S. Rept. No. 1622, 83d Cong., 2d Sess., pp. 258-260 (1954); H. Rept. No. 1337, 83d Cong., 2d Sess., pp. A106-A109 (1954). Cf. Commissioner v. Court Holding Co., 324 U.S. 331; United States v. Cumberland Pub. Serv. Co., 338 U.S. 451. Therefore, compliance with section 337 prevents gain from being recognized at the corporate level. It is clear that the statutory purpose of providing parity of treatment for unusual sales in liquidations would not be served by granting nonrecognition for gain derived from ordinary sales in the ordinary course of a corporation's business.

Petitioner was regularly engaged in various activities, all of which combined and interacted with each other to make up one closely integrated business--the business of operating a minor league baseball club. Petitioner would have us fractionalize this business into classes of those various activities that went to make up its usual, everyday operation of that business and, for the purposes of this case, to ignore or to relegate to a position of minor importance an activity that was a prerequisite to its being in the baseball business at all.

This is so because, as petitioner insists and as we have found, petitioner could not have initially obtained or continued to acquire any player contracts suitable for its business without having entered into the league agreement and the working agreements which required that petitioner sell such contracts on demand.

In Malat v. Riddell, supra, the Supreme Court approved the rationale of Corn Products Refining Co. v. Commissioner, 350 U.S. 46, in its construction of the statutory provision with which we now deal. The question in Corn Products (as in Malat) was whether futures trading of the taxpayer came within the exclusions from the definition of the term "capital assets."[3]

The taxpayer in that case had bought corn futures to protect itself against an increase in the price of its principal raw material needed in its manufacturing operations. The Supreme Court held that the transactions were an integral part of the operation of the taxpayer's business, for without them it was faced with the possi-

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[3]SEC. 1221. CAPITAL ASSET DEFINED.

For the purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include--

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

bility that it would not be able to obtain a ready supply of its necessary raw material, and at a price to permit of profitable operation.

In attempting to show that profits derived from the futures transactions were to be given capital gains treatment, the taxpayer pointed out that such transactions did not come within any of the exclusions from the term "capital asset" as enumerated in section 1221(1).

The Supreme Court held that such transactions were in fact excluded from the definition of capital assets and that their gains were to be taxed as ordinary income, stating:

Nor can we find support for petitioner's contention that hedging is not within the exclusions of §.117(a). Admittedly, petitioner's corn futures do not come within the literal language of the exclusions set out in that section. They were not stock in trade, actual inventory, property held for sale to customers or depreciable property used in a trade or business. But the capital-asset provisions of § 117 must not be so broadly applied as to defeat rather than further the purpose of Congress. Burnet v. Harmel, 287 U.S. 103, 108. Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss. The preferential treatment provided by § 117 applies to transactions in property which are not the normal source of business income. It was intended "to relieve the taxpayer from * * * excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions." Burnet v. Harmel, 287 U.S., at 106. Since this section is an exception from the normal tax requirements of the

Internal Revenue Code, the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly. This is necessary to effectuate the basic congressional purpose. This Court has always construed narrowly the term "capital assets" in § 117. See Hort v. Commissioner, 313 U.S. 28, 31; Kieselbach v. Commissioner, 317 U.S. 399, 403.

Petitioner's obligations under the league agreement and the working agreements were quite similar to the futures contracts in Corn Products in that they enabled petitioner to obtain ballplayers and guaranteed that the cost of ballplayers to petitioner would not become so high as to make it impossible for it to remain in the baseball business.

In Corn Products, entering into the futures contracts was a hedge against a high cost of essential materials to be used in manufacturing. In the instant case, entering into the league agreement and the working agreements was a similar hedge and even more, for it was the only way for it to obtain the contracts of suitable players in the first instance.

There are other respects in which the integral tie-in to petitioner's business activities is greater than that in Corn Products. While the taxpayer in Corn Products purchased corn futures for a business purpose, it could exercise the futures contracts or sell them as it saw fit for whatever ends it desired. In the present case, petitioner was required to sell a player's contract when called upon by the P.C.L. or the Pittsburgh club. Thus, there was less opportunity for it to hold player contracts as an investment to be sold when market conditions looked favorable. In order to enter, and to stay in business, petitioner had to agree to sell player con-

tracts even though such sales were not in its best economic interest. The taxpayer in Corn Products at least exercised its futures contracts only when it was to its advantage to do so.

The sale of 224 player contracts from 1948 through 1957, shows that petitioner's obligation to sell had substance, and was a vital, integral part of the day-to-day operation of its business. As in Corn Products, we can see no way to exclude this type of transaction from the mainstream of the taxpayer's business.

Petitioner cites a number of cases where assets used in a business were allowed capital gains treatment upon disposition, even though the sales took place on a regular basis. These include Massey Motors v. United States, 364 U.S. 92 (1960); Hertz Corp. v. United States, 364 U.S. 122 (1960); Grant Oil Tool Co. v. United States, 381 F.2d 389 (Ct. Cl. 1967); Hillard v. Commissioner, 281 F.2d 279 (C.A. 5, 1960), reversing 31 T.C. 961; Albright v. United States, 173 F.2d 339 (C.A. 8, 1949); McKinley Kirk, 47 T.C. 177 (1966); Philber Equipment Corp. v. Commissioner, 237 F.2d 129 (C.A. 3, 1956), reversing 25 T.C. 88; E. I. Du Pont De Nemours and Co. v. United States, 288 F.2d 904 (Ct. Cl. 1961); Philadelphia Quartz Co. v. United States 374 F.2d 512 (Ct. Cl. 1967); D. L. Phillips, 24 T.C. 435 (1955). In our view these cases are distinguishable, since, in none of them were both the purchase and the sale entered into in order that the taxpayer could carry on business in the first instance. In each, the sales were merely incidental to the operation of the business. There was no necessity that any sales eventually be made in order for the business to commence or continue, though it was likely in many of the cases that the sale of assets would take place on a regular basis.

In the instant case, petitioner had to agree to sell player contracts at a fixed price before it could obtain

them. Without entering into the working agreements and the league agreement, it could not have engaged in the professional baseball business at all. The agreements and the sales thereunder were at the heart and core of its business, essential for its existence, let alone the efficient operation of same.

The situation here is more nearly similar to those found in McMillan Mortgage Co., 36 T.C. 924 (1961); Hagan v. United States, 221 F. Supp. 248 (1963); Booth Newspaper, Inc. v. United States, 303 F.2d 284 (C.A. 6, 1960) affirming 31 T.C. 902; Bagley & Sewall Co., 20 T.C. 983 (1953); and America-Southeast Asia Co., 26 T.C. 198 (1956), where the Court's decision was based on rationale similar to that used in Corn Products, supra. In each of these cases the taxpayer entered into a transaction where both the acquisition and disposition of assets constituted an integral part of carrying on the business in the first instance, and in each case it was held that the transaction resulted in ordinary income or loss to the taxpayer.

Consideration of the entire record in the instant case, and giving due weight to all of the circumstances surrounding the player contracts, requires us to find and hold that they were an integral part of, and at the heart and core of petitioner's business. They were its stock in trade and were being held by petitioner principally for sale to customers in the ordinary course of its trade or business within the meaning of section 337 as the similar section 1221(1) was construed by the Supreme Court in Malat v. Riddell, supra. Petitioner argues that its principal purpose in holding the contracts was to play baseball, but before the game could start petitioner had to agree to sell the contracts on demand. Therefore, in our view, its motive of first importance was to hold the contracts for sale.

Decision will be entered for the respondent.

CORRECTED

EXHIBIT D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HOLLYWOOD BASEBALL ASSOCIATION,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
No. 23,056

[February 16, 1970]

On Petition for Review of the Decision of the Tax Court of the United States On Remand

Before: BARNES, BROWNING and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

Hollywood Baseball Association seeks review of a decision of the Tax Court. This is the second time that the case has been before us. The first decision of the Tax Court is reported at 42 T.C. 234 (1964). We affirmed, 1965, 352 F.2d 350. On certiorari, the Supreme Court reversed and remanded for reconsideration in the light of *Malat v. Riddell*, 1966, 383 U.S. 569. *Hollywood Baseball Ass'n v. Commissioner*, 1966, 383 U.S. 824. We remanded to the Tax Court for new findings. The Tax Court again decided for the Commissioner, 1968, 49 T.C. 338. We affirm.

The facts are stated in detail in the first decision of the Tax Court. In the decision now under review, the Tax Court did not receive additional evidence. It found that Hollywood's "player contracts were petitioner's stock in trade, held principally for sale to customers in the ordinary course of its trade or business within the intendment of section 337 [I.R.C. § 337(b)(1)(A)] as construed by the Supreme Court in *Malat*. . . ." The opinion, however, makes it clear that this "finding" is a legal conclusion that the player contracts "were an integral part of, and at the

heart and core of petitioner's business. . . . Petitioner argues that its principal purpose in holding the contracts was to play baseball, but before the game could start petitioner had to agree to sell the contracts on demand. Therefore, in our view, its motive of first importance was to hold the contracts for sale."

The record also makes it clear that this holding is not really based upon *Malat, supra,* but on the decision in *Corn Products Refining Co. v. Commissioner,* 1955, 350 U.S. 46. As the Tax Court put it, "In *Malat* . . . the Supreme Court approved the rationale of *Corn Products* . . . in its construction of the statutory provision with which we now deal."

Were it not for *Corn Products,* we would have great difficulty with this decision. It is uncontradicted that Hollywood was organized and operated as a minor league baseball club. The primary reason for its existence was to make money by playing professional baseball and selling tickets to the games. To do this, it had to have players, just as a factory has to have a building, machinery and employees. The peculiar rules of baseball required that it make its player contracts available for sale. But nothing in the record would support a finding that it made the contracts available because it wanted to—that this was the reason why it made the contracts, or that it wanted to sell its best players, either under the player draft or under its working agreement with Pittsburgh. We think that the contrary is obviously true—it sold its players because it had to agree to do so in order to be in business. We have no doubt that it hoped that it could keep its players. In short, we think it quite unrealistic to say that *in fact,* to use the language of *Malat,* Hollywood's player contracts were held by it "principally" for sale to customers, or that sale to such customers was "of first importance" in its holding of the contracts.

Nevertheless, we conclude that the principle of *Corn Products* is applicable here, and that the Tax Court correctly applied it.

In *Corn Products, supra,* a manufacturer of products made from grain corn purchased corn futures in order to insure an adequate supply of raw materials. If no shortage of corn was imminent, the company would later sell the futures. This system protected it against price increases for corn. The Supreme Court held that the profits and losses from the transactions in

corn futures were *not* entitled to capital assets treatment, because the transactions were an "integral part" of its business. (350 U.S. at 51.) The Court's reasoning is:

> "Nor can we find support for petitioner's contention that hedging is not within the exclusions of § 117 (a). Admittedly petitioner's corn futures do not come within the literal language of the exclusions set out in that section. They were not stock in trade, actual inventory, property held for sale to customers or depreciable property used in a trade or business. But the capital-asset provision of § 117 must not be so broadly applied as to defeat rather than further the purpose of Congress. *Burnet v. Harmel*, 287 U.S. 103, 108. Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss. The preferential treatment provided by § 117 applies to transactions in property which are not the normal source of business income. It was intended 'to relieve the taxpayer from . . . excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions.' *Burnet v. Harmel*, 287 U.S., at 106. Since this section is an exception from the normal tax requirements of the Internal Revenue Code, the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly. This is necessary to effectuate the basic congressional purpose. This Court has always construed narrowly the term 'capital assets' in § 117. See *Hort v. Commissioner*, 313 U.S. 28, 31; Kieselbach v. Commissioner, 317 U.S. 399, 403."

Section 117(a) of the 1939 Code is now § 1221 of the 1954 Code.

In *Malat, supra*, petitioner was part of a joint venture which bought a 45 acre tract of land. He claimed that the intended use was for an apartment project; the government claimed that the intended use was dual; either developing for rental purposes, or selling, whichever proved to be the more profitable. The District Court found the dual purpose, and that the property was therefore held "primarily" for sale to customers in the ordinary course of business, with "primarily" meaning "substantially." The Supreme Court held that "primarily" meant

just what it said—"of first importance" or "principally," and remanded for further findings. The Court's entire discussion of its reasons is as follows:

> "The purpose of the statutory provision with which we deal is to differentiate between the 'profits and losses arising from the everyday operation of a business' on the one hand [citing *Corn Products*] and 'the realization of appreciation in value accrued over a substantial period of time' on the other (*Commissioner v. Gillette Motor Co.*, 364 U.S. 130, 134.) A literal reading of the statute is consistent with this legislative purpose. We hold that, as used in § 1221(1), 'primarily' means 'of first importance' or 'principally.'" (383 U.S. at 572.)

A recent article (Bernstein, "Primarily for Sale": A Semantic Snare, 20 *Stan.L.Rev.* 1093 (1968)) argues persuasively that the Supreme Court erred in *Malat* because all the lower courts and the lawyers had framed the issues incorrectly. Everyone treated the case as a "dual purpose" one, whereas it should have been treated as an "undecided purpose" case, which is more analogous to a "change of purpose" case. Anyone who purchases property, even if solely for investment purposes, will sell it if offered a sufficiently attractive price.

However, the Supreme Court has spoken, and has spoken broadly, and we are bound by its decision. Moreover, it is clear that our case is not a dual purpose, change of purpose, or undecided purpose case. It is, rather, unique: contracts, the terms of which are a condition precedent to the carrying on of the main purposes of the business, playing baseball and selling tickets, and which make the contracts saleable on the demand of a buyer.

A preliminary question is whether or not *Malat* is applicable to this case at all. *First*, *Malat* dealt with § 1221(1) assets. Is the same reasoning also applicable to § 1231 (depreciable) assets such as are involved here? The same phrase, "primarily for sale to customers in the ordinary course of business" is to be found in both sections, and the Court in *Malat* emphasized that "the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses." We see no reason why the word "primarily" should be viewed

differently in § 1231 than in § 1221. Accordingly, *Malat* applies to § 1231 assets.

A second preliminary question is whether *Malat* applies to § 337. Again, the language used is similar. Furthermore, the Supreme Court's vacation and remand of the instant case "for further consideration in light of *Malat v. Riddell*" [383 U.S. 824] would seem to indicate that the similar language of the two statutees is to be construed similarly. Accord, *Pridemark, Inc. v. Commissioner*, 4 Cir., 1965, 345 F.2d 35, 45. Apparently, the Supreme Court thinks that *Malat* is applicable.

Although, technically, the Supreme Court's language in *Malat* is dictum insofar as sections 1231 and 337 are concerned, it is certainly dictum which cannot lightly be disregarded. Yet, as we have seen, it is arguable that this is exactly what the Tax Court has done. The Tax Court has purported to merge the "primarily" test of *Malat* with the "integrally" test of *Corn Products*, and would deny capital asset treatment on the finding that the sales were "*an* integral part" of the business. Nevertheless, in *Malat* the Supreme Court cited *Corn Products* with approval, and relied upon its reasoning. We therefore think that it was proper for the Tax Court to do so in this case.

We think that the Tax Court properly held that Hollywood is not entitled to the benefits of § 337 under the *Corn Products* rationale, even though the player contracts were *not* primarily held for sale to customers in the ordinary course of business. This result depends on three steps: (1) that *Corn Products* is applicable to depreciable assets; the baseball player contracts are subject to depreciation; (2) that *Corn Products* is applicable to § 337; *Corn Products* itself was a § 1221 case; and (3) that the requirements of *Corn Products* are met, the integral "core" test. We discuss each of these steps in turn.

(1) Is *Corn Products* applicable to depreciable property?

Although the Commissioner has attempted to extend *Corn Products* to depreciable property, which we refer to as § 1231 assets, see Rev. Rul. 58-77, 1958-1 Cum.Bull. 118, the attempt has so far been unsuccessful. See Bernstein, *supra*, 20 *Stan. L.Rev.* at 1116. However, only the Court of Claims and a few district courts have been presented with this problem. Although

the Court of Claims has noted that no case has applied *Corn Products* to § 1231 assets, and although it "questions" its applicability, in each case presenting the question the Court has reserved the question, instead of holding that the sales involved were not "integral." See *E.I. Du Pont De Nemours & Co. v. United States*, Ct.Cl., 1961, 288 F.2d 904; *Philadelphia Quartz Co. v. United States*, Ct.Cl., 1967, 374 F.2d 512; *Grant Oil Tool Co. v. United States*, 1967, Ct.Cl., 381 F.2d 389, 398. In *Fishing Tools, Inc. v. Usry*, E.D.La., 1964, 232 F.Supp. 400, the court rejected a contention that *Corn Products* applied evidently because there was no pattern of regularity as to the activities in question.

Deltide Fishing & Rental Tools, Inc. v. United States, E.D.La., 1968, 279 F.Supp. 661, is the only case to confront the problem squarely. As alternate holding, the Court said that *Corn Products* did *not* apply to depreciable assets. Its reasoning is as follows:

> "Section 1231 refers to the very class of property excluded from the definition of capital asset by § 1221(2) [as depreciable] and, with certain qualifications, allows gains from sales or involuntary conversions of such property to be *treated*, or, to use the exact language of the statute, '*considered* as gains * * * from sales or exchanges of capital assets. * * *' § 1231(a) (emphasis added) . . . 'Congress has said, in effect, that even though property used in the trade or business is not a capital asset, we are to treat it as a capital asset.'" [at p. 665.]

The court then distinguished broad language in *Commissioner v. Gillette Motor Transp., Inc.*, 1960, 364 U.S. 130 that "'property used in the trade or business' (§ 1231) to be eligible for capital-gains treatment, must satisfy the same general criteria as govern the definition of capital assets." The court then continues:

> "Congress has thus said, in effect, that even though property used in the trade or business is not a capital asset, we are to treat it as a capital asset. In so doing, Congress may well have established a *fence of immunity* from the *Corn Products* doctrine around 'property used in the trade or business': The *Corn Products* doctrine permits the courts to carve out nonstatutory exceptions to the definition of capital asset; but Congress has said that where property

> used in the trade or business is concerned, it will be treated as a capital asset even though it is not a capital asset." [At p. 666.]

The court also "deemed it of some weight" that in the 1939 Code, all capital asset provisions were dealt with in § 117; but in the 1954 Code, Congress split that section into several headings, with § 1221 under the title "*General* Rules for Determining Capital Gains and Losses," and § 1231 under the heading "*Special* Rules for Determining Capital Gains and Losses."

We find this argument unconvincing. Whether property comes under § 1221 (and is therefore *defined* as a capital asset) or whether it comes under § 1231 (and is therefore *treated* as a capital asset even though it is excluded from the § 1221 definition) should make no difference, because the policy is the same—not to give preferential treatment to profits and losses arising from the everyday operation of the business. Where the transactions are "everyday," there would be no "excessive tax burden" in taxing them as ordinary income. We do not see why the fact that the property is subject to depreciation should make any difference. Finally, the fact that in enacting the 1954 Code Congress split former § 117 into two or more different sections proves nothing. The legislative history shows that no substantive changes were intended. See [1954] 3 U.S. Code, Cong. & Ad. News 4415, 4417, 5075, 5076.

Deltide is the only case to discuss the applicability of *Corn Products* to depreciable assets. A law review article (Bernstein, 20 *Stan.L.Rev.* at 1116 (*supra*)) argues:

> *Corn Products* represents judicial indifference to statutory language. Courts therefore are apt to be reluctant to broaden its scope. It is not unlikely that they will continue to confine it to situations analogous to its own facts: namely, transactions outside the ordinary course of the business that serve a special function of protecting or preserving some asset (usually inventory) used in the normal course of the business. Despite efforts by the Government, the *Corn Products* doctrine has not been extended to sales of depreciable property."

But, as noted above, all of the cases cited (*Deltide* came later) reserved the question of the applicability of *Corn Products* to

§ 1231 assets. And even assuming that *Corn Products* is and should be limited, as Bernstein says, there is nothing in such a limitation that would necessarily exclude depreciable property. If the transactions serve the function of preserving depreciable property, why should *Corn Products* not apply? We hold that *Corn Products* can be applied to depreciable assets.

(2) Is *Corn Products* applicable to § 337?

The Tax Court applied *Corn Products* to § 337 by equating its "integral" test with the "primarily" of "property held primarily for sale." As noted above, we doubt that this can be done. In *Malat*, the Supreme Court held that "primarily" means "of *first* importance." Hence, the fact that an activity is *an* integral part of a business is not enough. Also, *Corn Products* has nothing to do with "primarily for sale." It is a separate, nonstatutory exception to the definition of capital assets. As such, can it be extended to § 337?

It readily appears that § 337 does not necessarily make distinctions based on whether or not property is a capital asset. Under §§ 1221 and 1231, all property is either defined as a capital asset or treated as one, *except:*

a. copyrights, etc.

b. depreciable property or realty used in trade or business and held *less* than 6 months

c. depreciable property or realty used in trade or business, held *more* than 6 months, and which is
   (1) inventory
   (2) stock in trade, or
   (3) held primarily for sale to customers in the ordinary course of business

By contrast, § 337 applies to all property except

a. stock in trade

b. inventory

c. property held primarily for sale to customers in the ordinary course of business

d. certain installment obligations

In other words, the fact that property is defined as or treated as a capital asset under §§ 1221 and 1231 does not necessarily mean that it is not entitled to nonrecognition under § 337. *Contra, Pridemark, Inc. v. Commissioner*, 4 Cir., 1965, 345 F.2d 35, 45. Consequently, the *Corn Products* nonstatutory exception to the definition of capital assets is not necessarily applicable to § 337.

It has been held in numerous cases that court decisions and legislative history in connection with §§ 1221 and 1231 are relevant in construing § 337. See, *e.g., Jeanese, Inc. v. United States*, N.D. Cal., 1964, 227 F.Supp. 304, 308. However, these cases (except *Pridemark, supra*) were dealing with the phrase "primarily for sale, etc." which appears in both § 337 and in the capital asset sections. As noted above, the *Corn Products* doctrine, although in some way related to the concept behind "primarily for sale," is actually independent of it.

So the question remains, what is the purpose behind the various exclusions from § 337? The legislative history is notably unhelpful. A Senate report says, "It is intended that, during the 12-month period, sales in the ordinary course of business shall result in ordinary gain to the corporation as if the corporation were not in the process of liquidating." S.Rep. No. 1622, 83d Cong., 2d Sess., [1954] 3 U.S. Code Cong. & Ad. News 4621, 4897. However, this sentence, although relied on in *Pridemark, supra*, appears in a paragraph discussing the bulk sales exception, § 337(b)(2), relating to inventory.

According to the Commissioner's brief:

> "The declared legislative purpose in limiting nonrecognition of gain or loss at the corporate level to properties qualifying as capital assets (or inventory assets sold in bulk sale to one buyer) was to prevent taxpayers from escaping tax on sales made *in the ordinary course of business* of the corporation merely because the income was received during the 12 months liquidation period." (Emphasis supplied.) H.Rep.No. 1337, 83d Cong., 2d Sess., p. A-107 ([1954] 3 U.S. Code Cong. & Adm. News 4017, 4245.)

Not quite. As already noted, § 337 does not speak in terms of capital assets, and the definitions of property under § 337 do not always jibe with the definitions under §§ 1221 and 1231.

Furthermore, the Commissioner is quoting from the House Report, which said:

> "Paragraph (1) of subsection (a) makes this subsection specifically inapplicable to a sale made in the ordinary course of the business of the corporation although such sale occurs after adoption of the plan of partial or complete liquidation." ([1954] 3 U.S. Code, Cong. & Adm. News 4245.)

However, the House bill said that subsection (a) did not apply to any "sale in the ordinary course of business." And this bill never passed. The Senate bill (which ultimately did pass) uses quite different language "stock in trade . . . inventory . . . property held by the corporation primarily for sale to customers in the ordinary course of business." The Senate Report does not say why the terminology was changed, except to say that:

> "While the purpose intended to be served by section 337 [Senate] is similar to that provided in section 333 of the House bill, the language and approach of section 337 differs from that of section 333." ([1954] 3 U.S. Code Cong. & Adm. News, at 4896.)

The Senate Report also says:

> "It is intended that, during the 12-month period, sales in the ordinary course of business shall result in ordinary gain to the corporation as if the corporation were not in the process of liquidating." (*Id.* at 4897.)

Again, this sentence appears in a section discussing the bulk sales exception relating to inventory. Perhaps the changes in terminology were made in order to make the language of § 337 more nearly approximate the language of §§ 1221 and 1231. If so, it would seem to follow that *Corn Products* is applicable to § 337.

This conclusion becomes more reasonable in view of the rule that § 337 should be strictly construed. See *Whitson v. Rockwood*, D.N.D., 1960, 190 F.Supp. 478, 481; *cf. Factor v. Commissioner*, 9 Cir., 1960, 281 F.2d 100, 119.

Finally, the Commissioner argues that the Supreme Court by remanding this case for further consideration in the light of

Malat, "made it quite clear that the correlative provisions of § 337 and § 1221 are to be construed in an identical manner." Again, not quite. All the Supreme Court's action indicates is that the Court saw that the provisions are *arguably* similar, and left it to the lower courts to decide if in fact they are.

We conclude that *Corn Products* is applicable to § 337.

(3) Are the requirements of *Corn Products* met?

The cases are not always consistent. Thus, the Tax Court in the instant case emphasized the *involuntariness* of the baseball player contract sales as showing that they were "integral."

> "The agreements and the sales thereunder were at the heart and core of its business, essential for its existence let alone for the efficient operation of same."

But Hollywood argues that other cases have held that the *necessity* of an activity can show that capital asset treatment is appropriate. In *Philber Equipment Corp. v. Commissioner*, 3 Cir., 1956, 237 F.2d 129, a taxpayer in the business of renting trucks and the like also regularly sold them after they had been rented a while:

> "[S]uch sales were not part of a business of selling trucks, but rather the natural conclusion of the business rental cycle. Further, the rental period was not the result of a voluntary act on the taxpayer's part, but rather an unavoidable consequence of conditions existing in the business. The acquisition and disposition of equipment was an essential aspect of the business of renting equipment. . . . Standing alone, such dispositions, even though a necessary and frequent element of the taxpayer's business cannot be considered inconsistent with the conduct of a rental business or make the sale factor a dominating business purpose of taxpayer."

Accord, *Hillard v. Commissioner*, 5 Cir., 1960, 281 F.2d 279.

However these cases were dealing with the phrase "held primarily for sale, etc." They did not cite *Corn Products* at all — except that the dissent in *Hillard* said that the sales of rental cars:

"are not entitled to the preferential treatment provided in section 117 for 'transactions in property which are not the normal source of business income.' *Corn Products*. . . ."

Compare *Massey Motors, Inc. v. United States*, 1960, 364 U.S. 92, and *Hertz Corp. v. United States*, 1960, 364 U.S. 122, which simply assumed that rental businesses were entitled to capital asset treatment when the rental equipment was sold. See *Hillard, supra*, 281 F.2d at 283-84. Consequently, *Philber Equipment* and *Hillard* are not very strong authority against the result reached by the Tax Court in the instant case.

The Commissioner relies on a number of cases in support of the application of *Corn Products* to this case. We summarize them in the margin.[1] Appellant seeks to distinguish these cases

[1] (1) *Mansfield Journal Co. v. Commissioner*, 6 Cir., 1960, 274 F.2d 284. A publisher entered into a ten year contract for a supply of 1000 tons of newsprint, in order to assure itself a continuous supply. In some years, it sold its right to receive portions of the tonnage to other papers. Held, not entitled to capital gain treatment, as in the nature of a commodity future, relying on *Corn Products*. The contract was not an investment, but a means of protection, "unalterably tied in with and related to petitioner's publishing business." Petitioner was not acting as a capital investor, but as a "far-sighted manufacturer." The court construed the definition of capital asset narrowly, and its exceptions broadly.

(2) *Commissioner v. Bagley & Sewall Co.*, 2 Cir., 1955, 221 F.2d 944. Taxpayer was required to deposit government bonds as security for performance of a contract with Finland. When the bonds were returned upon performance of the contract, taxpayer immediately sold them, at a loss. Held (affirming Tax Court): the loss was deductible as an ordinary and necessary business expense, since the bonds were assets held for sale in the ordinary course of business. The transaction was merely an incident to and necessitated by the performance of the contract in the ordinary course of business. (This case was decided a few months before *Corn Products*.)

(3) *Booth Newspapers, Inc. v. United States*, Ct.Cl., 1962, 303 F.2d 916. Two newspapers purchased all the stock of a paper mill in order to assure a supply of newsprint. Several years later, after having signed contracts which assured them of an adequate supply of newsprint, they sold the stock at a substantial loss. Held, the papers were entitled to ordinary loss treatment, since the losses were ordinary business expenses. *Corn Products* and other cases were discussed. "They [the cases cited] stand for the proposition that, if securities are purchased by a taxpayer as an integral and necessary act in the conduct of his business . . . any loss incurred . . . may be fully deducted from gross income as a business

on the ground that in each there was a definite tie-in between the item in question and the taxpayer's inventory or property admittedly held primarily for sale, while in the case at bar the Tax Court could find no property initially held primarily for sale in the first place for a tie-in. . . .

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expense or ordinary loss. If, on the other hand, an investment purpose be found to have motivated the purchase or holding of the securities, any loss realized upon their ultimate disposition must be treated in accord with the capital asset provisions of the Code." 303 F.2d at 921.

(4) *John J. Grier Co. v. United States*, 7 Cir., 1964, 328 F.2d 163. Plaintiff restauranteur wanted to purchase a supper club from its corporate owner. Since the lessor of the premises was unlikely to agree to any assignment of the lease to Grier, he bought all the stock of the corporation for the same price he would have paid for the supper club assets themselves. A few years later, he sold the stock to the lessor at a substantial loss. Held, he was entitled to an ordinary loss deduction. He bought the stock, which had value only to someone who wished to operate the Club, only to secure the assets as an incident to conduct of its restaurant business, and not as an investment. *Corn Products* was not cited.

(5) *F. W. Drybrough*, 45 T.C. 424, 437-48 (1966), *aff'd per curiam*, 6 Cir., 1967, 384 F.2d 715. The owner of a collection agency had bought some accounts from his clients; and later sold them, along with the rest of the business. Held, the accounts were not capital assets under the teaching of *Corn Products;* they were the "normal source of business income," and were involved in the everyday operation of the business. "When viewed in this light, the accounts were, in fact, 'stock in trade,' properly includible in inventory although the actual sales of these accounts were few, the collections upon them were, in a sense, tantamount to sales." The sixth circuit affirmed per curiam, "on the authority of" *Corn Products* and *Mansfield Journal*.

(6) *Hallcraft Homes, Inc. v. Commissioner*, 9 Cir., 1964, 336 F.2d 701, 705. A land developer was required to advance, or loan, thousands of dollars to local water companies to pay for the installation of water lines, etc. The sums were to be repaid over a period of years as a percentage of the receipts which the water companies would get from the new users. Later, the City of Phoenix purchased the water companies and their liabilities; and plaintiff agreed to accept a lump sum in exchange for the future repayment rights. Held taxable as ordinary income on non-*Corn Products* grounds. But the court said: "It is true that the taxpayer in the case at bar entered into the water refund agreements as an integral part of its business . . . Since the sale was made in good faith in the furtherance of the business, and since the agreements were entered into as an integral part of the business of the taxpayer, the 'integral part of the business' theory of *Corn Products* might very well be compelling and controlling here. Yet we need not so decide, and do not. . . ."

We disagree. In *Mansfield Journal and* Booth Newspapers, the contracts were entered into to assure a supply of raw materials. They had nothing to do with inventory or property held primarily for sale. The taxpayers were selling newspapers, not news print. *Bagley & Sewall* and *John J. Grier Co.* similarly had nothing to do with inventory or property held primarily for sale. Rather, the activities in all of these cases were conducted in order to allow the taxpayer to conduct his business at all. "The transaction was merely an incident to and necessitated by the performance of the contract in the ordinary course of business." [*Bagley & Sewall.*] Sometimes the contracts relate to inventory, etc., and sometimes not. What is important is that the activities were "integral"—carried on *to protect or to allow the function* of the taxpayer's true business. Similarly, taxpayer in the case at bar signed agreements requiring it to give up baseball players at the will of the major leagues, in order to be assured of a supply of capable ball players in the first place. The ball players are, in a sense, the "raw materials" of appellant's business. The product is baseball games.

The cases upon which Hollywood relies are distinguishable: *Scheuber v. Commissioner,* 7 Cir., 1967, 371 F.2d 996 involved real estate held for from 8 to 14 years and sold without advertising. *Hillard v. Commissioner,* 5 Cir., 1960, 281 F.2d 279 involved sales of used cars by a person in the car rental business. *Philber Equip. Corp. v. Commissioner,* 3 Cir., 1956, 237 F.2d 129 also involved sales of used equipment of a leasing business. *E. I. DuPont De Nemours & Co. v. United States,* Ct. Cl., 1961, 288 F.2d 904, 909 involved forfeited deposits on unreturned pressurized gas cylinders. *Philadelphia Quartz Co. v. United States, Ct. Cl.,* 1967, 374 F.2d 512, 515, *Grant Oil Tool Co. v. United States, Ct. Cl.,* 1967, 381 F.2d 389, and *Deltide Fishing & Rental Tools, Inc. v. United States, E.D.La.,* 1968, 279 F.Supp. 661 are similar. *Albright v. United States,* 8 Cir., 1949, 173 F.2d 339, and *McKinney v. Kirk,* 1966, 47 T.C. 117, involved sales of culls from a herd or stable of breeding animals.

In the case at bar, Hollywood had to agree to sell the player contracts on demand, in order to be in the baseball business. In the cases discussed above, on the other hand, the sales activities were merely part of the last phase of a cycle in the use of capital goods, the replacement or sale of equipment no longer

usable in the business itself. The player contracts in the case at bar were never sold because the players were no longer fit to play league baseball. Rather, the sales were generally of the more valuable players, whom the majors wanted for their own teams. We are not dealing with the replacement of an obsolete factory, old rental cars, or lost or damaged rental tools. The latter would seem to be the type of activities which the capital asset provisions were intended to cover. Rather, we are dealing with sales pursuant to an agreement which the taxpayer had to sign in order to be able to attract talented ball players—in effect, the "raw materials" or "stock in trade" of the business—in the first place. Such an activity would seem to be as "integral" as one could get.

We conclude that the Tax Court correctly applied *Corn Products* in the light of *Malat*. We need not consider other grounds on which the Commissioner seeks to support the decision.

Affirmed.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 2-20-70—325

INDEX

	Page
Opinions below, jurisdiction, and statutes involved	1
Question presented	1
Statement	2
Argument	5
Conclusion	15

CITATIONS

Cases:

American Can Co. v. *Commissioner*, 317 F. 2d 604, certiorari denied, 375 U.S. 993	7, 9
Arrowsmith v. *Commissioner*, 344 U.S. 6	10
Citizens Federal S. & L. Ass'n of Cleveland v. *United States*, 154 Ct. Cl. 305, 290 F. 2d 932	10
Coast Coil Co. v. *Commissioner*, 50 T.C. 528, affirmed *per curiam*, 422 F. 2d 402	12
Commissioner v. *Anders*, 414 F. 2d 1283, certiorari denied, 396 U.S. 958	10
Commissioner v. *Kuckenberg*, 309 F. 2d 202	6
Continental Can Co. v. *United States*, 422 F. 2d 405, petition for certiorari pending, No. 164, this term	8, 9
Corn Products Co. v. *Commissioner*, 350 U.S. 46	5, 10, 11, 12, 13, 14
Family Record Plan, Inc. v. *Commissioner*, 309 F. 2d 208	6
Hallcraft Homes, Inc. v. *Commissioner*, 336 F. 2d 701	10
Hillard v. *Commissioner*, 281 F. 2d 279	13, 14
Malat v. *Riddell*, 383 U.S. 569	4, 5, 7, 8
Municipal Bond Corp. v. *Commissioner*, 341 F. 2d 683	14
Nash v. *United States*, No. 678, 1969 Term, decided May 18, 1970	10
O'Meara v. *Commissioner*, 8 T.C. 622	9

Cases—Continued

	Page
Philber Equipment Corp. v. *Commissioner*, 237 F. 2d 129	13, 14
Pridemark, Inc. v. *Commissioner*, 345 F. 2d 35	12
Recordak Corp. v. *United States*, 163 Ct. Cl. 294, 325 F. 2d 460	7, 8
Steadman v. *Commissioner*, 424 F. 2d 1	12
Sullivan, Alice Phelan, Corp. v. *Commissioner*, 180 Ct. Cl. 659, 381 F. 2d 399	9
Tomlinson v. *Dwelle*, 318 F. 2d 60	8
United States v. *Skelly Oil Co.*, 394 U.S. 678	9
Waterman, Largen & Co. v. *United States*, 189 Ct. Cl. 364, 419 F. 2d 845	12
West Seattle National Bank of Seattle v. *Commissioner*, 288 F. 2d 47	10
Williamson v. *United States*, 155 Ct. Cl. 279, 292 F. 2d 524	6
Statutes:	
Internal Revenue Code of 1939, Sec. 117, 26 U.S.C. (195a ed.) 117	11, 12
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 337	1, 2, 4, 5, 6, 10, 12, 13
Sec. 337(a)	10, 11
Sec. 337(b)	10
Sec. 337(b)(1)	10, 11
Sec. 337(b)(1)(A)	5, 11, 12
Sec. 1221	12
Sec. 1221(1)	11
Sec. 1231	13, 14
Sec. 1245	13
Miscellaneous:	
H. Rep. No. 1337, 83d Cong., 2d Sess.	6
1 Mertens, *Law of Federal Income Taxation*, Sec. 7.34	10
Rev. Rul. 61-214, 1961-2 Cum. Bull. 60	10
S. Rep. No. 1622, 83d Cong., 2d Sess.	6

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 157

HOLLYWOOD BASEBALL ASSOCIATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

The opinions below, the basis of this Court's jurisdiction, and the statutes involved are adequately set forth in the petition.

QUESTION PRESENTED

Whether the court of appeals correctly held that amounts received by petitioner, a minor league baseball club, on player contract sales during the twelve-month period following adoption of a plan of complete liquidation, did not fall within the nonrecognition provisions of Section 337 of the Internal Revenue Code.

STATEMENT

Petitioner, a corporation, operated the "Hollywood Stars," a professional minor league baseball team in the Pacific Coast Baseball League. On December 17, 1957, its stockholders adopted a plan of complete liquidation. (Pet. App. C39.)

Among petitioner's assets at the time were contracts for the services of professional baseball players. Subsequent to December 17, 1957, and during petitioner's fiscal year ended October 31, 1958, petitioner sold at least six and possibly eight of these contracts[1] to the Pittsburgh Athletic Club and to its affiliate, the Columbus Baseball Club.[2] Petitioners profit from the eight sales was $117,000.[3]

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[1] The Commissioner contended below that two contracts were sold prior to adoption of the plan of liquidation and thus were not subject to nonrecognition treatment under Section 337 in any event. Since it was held that none of the contracts was subject to such treatment, this issue has never been resolved. (Pet. App. A27.)

[2] By agreement dated December 18, 1957, petitioner's remaining player contracts (approximately 28) were sold to the Salt Lake City Baseball Club, along with petitioner's franchise and equipment. The bulk sale of these player contracts is not here in issue.

[3] Two of the contracts, which had cost petitioner $1,500, were sold for $140,000 in installment payments. Petitioner received $50,000 of this amount in its fiscal year ended October 31, 1957, and reported the $50,000 as ordinary income for that year. A total of $27,000 was received by petitioner for the remaining six contracts which had cost it $17,650. The cost of the player contracts was deducted by petitioner as an item of current expense in the years the contracts were purchased. The $117,000 profit in the fiscal year 1958 was computed by adding $90,000 ($140,000 less $50,000) earned on the sale of the two contracts, and $27,000 from the sale of the six contracts. (Pet. App. A19, C39).

In order to prevent minor league clubs from holding on to a player indefinitely, the major leagues required each such club to sell each year to any major league club on demand, at least one player contract which previously had been assigned outright to that club by a major league club, and to sell the contracts of all players with five years or more of service to any major league club on demand. This arrangement, to which petitioner was a party, was known as the player draft. (Pet. App. C39.)

In addition to the league requirements, petitioner was party to so-called "working agreements" with major league clubs during relevant years, which provided, *inter alia*, that a major league club could select at any time any player's contract which petitioner owned. Petitioner was unable to compete with major league clubs in recruiting good young players. Consequently, unless it entered into such working agreements, it would have been unable to obtain quality players for its team. All such player contracts were owned by major league clubs and would be assigned to petitioner only under the conditions prescribed in the working agreements. (Pet. App. C39–C40.)

From 1948 through 1957, petitioner purchased 175 player contracts and sold 224 such contracts, or an average of over 22 contracts a year. Throughout this period, petitioner consistently reported income from these sales either as a part of its gross sales, or as other income from business operations. Consistently, petitioner also deducted against ordinary income the entire costs of acquiring player contracts and of training players. (Pet. App. A24–A26.)

Section 337 of the Internal Revenue Code provides for non-recognition of gain or loss on the sale or exchange of corporate property made within 12 months after adoption of a plan of complete liquidation, but specifically excludes from such treatment property held by the corporation "primarily for sale to customers in the ordinary course of its trade or business." On its fiscal 1958 income tax return, petitioner omitted from income the $117,000 it received on the sale of player contracts in that year ($90,000 from the sale of two players, and $27,000 from the sale of six players). It did so on the ground that the contracts were not held by it "primarily for sale" to customers in the ordinary course of business. The Commissioner asserted a deficiency and petitioner sought a redetermination in the Tax Court. That court held (Pet. App. A17–A33) that the player contracts were held primarily for sale and that the sales proceeds therefore were taxable. The court interpreted "primarily" to mean "substantially" or "essentially" rather than "of first importance" or "chiefly." The Ninth Circuit affirmed (Pet. App. B34–B36). On petition to this Court, the case was remanded for reconsideration in the light of this Court's holding in *Malat* v. *Riddell*, 383 U.S. 569, that "primarily for sale" as used in Section 1221 of the Code means "of first importance" or "principally," rather than "substantially" or "essentially" (383 U.S. 824).

On remand, the Tax Court found (Pet. App. C48) that (1) petitioner's motive of first importance was "to hold the contracts for sale" and (2) the contracts were petitioner's "stock in trade * * * held * * * prin-

cipally for sale to customers in the ordinary course of its trade or business" within the intendment of Section 337 and the meaning of *Malat* v. *Riddell*. On appeal, the Ninth Circuit reasoned (Pet. App. D50) that it would be unrealistic to say that, in fact, the contracts "were held * * * 'principally' for sale to customers, or that sale to such customers was 'of first importance'" when petitioner "sold its players because it had to agree to do so in order to be in business." The court agreed, however, that the sales were an integral part of petitioner's business and that the player contracts represented petitioner's raw materials or stock in trade. It accordingly affirmed the Tax Court decision as a correct application of the rationale of *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, as approved in *Malat* v. *Riddell*, *supra*.

ARGUMENT

The decision below is correct. There is no conflict of decisions or other basis for further review.

1. Section 337 of the Code provides for nonrecognition of gain on the "sale or exchange" by a corporation of "property" during the 12-month period between the adoption and execution of a plan of complete liquidation. Excluded, however, from nonrecognition treatment (Section 337(b)(1)(A)) are gains or losses from the sale or exchange of—

> stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation * * * and property held by the corporation primarily for sale to customers in the ordinary course of its trade or business.

The purpose of Section 337 is to eliminate the double incidence of capital gains taxation on a sale of assets by a liquidating corporation—once when the corporation sells its assets, and a second time on distribution of the proceeds to its shareholders in liquidation. Nonrecognition treatment thus is not available on sales of property in the ordinary course of business during the 12-month liquidation period, which would result in ordinary income if the corporation was not in the process of liquidating. H. Rep. No. 1337, 83d Cong., 2d Sess., p. A107; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 259; *Williamson* v. *United States*, 155 Ct. Cl. 279, 292 F. 2d 524; *Commissioner* v. *Kuckenberg*, 309 F. 2d 202 (C.A. 9); *Family Record Plan, Inc.* v. *Commissioner*, 309 F. 2d 208 (C.A. 9).

As the record indicates and the courts below found, petitioner was engaged both in presenting baseball games and in selling baseball player contracts. The latter aspect of its business was a regularly conducted operation. Sales were frequent and continuous, averaging 22 players a year, and they provided a normal source of business income over the years. During the course of its operations from 1948 through 1957, petitioner recognized these business facts and consistently reported gain on player contract sales as ordinary business income, taking ordinary deductions for the costs of acquiring the player contracts and training the players.

There is no basis under Section 337 for affording nonrecognition treatment to sales of these player contracts, which were made in the normal course of peti-

tioner's business during the 12-month liquidation period. The essential character of the contracts having been established in prior years, sales of the contracts during the liquidation period cannot be considered extraordinary sales. The decision below denying nonrecognition treatment thus is correct.

2. *Malat* v. *Riddell*, 383 U.S. 569, upon which petitioner relies (Pet. 11–14), does not require a different result. In that case, the taxpayers acquired property for the purpose of commercial development, intending a sale in bulk only in the event their plans fell through, and only then (*id.*, p. 571) "so they wouldn't get hurt." This Court held that the latter purpose would not be sufficient to require ordinary income treatment upon the sale of the property unless it was the principal purpose for which the property had been held. It may fairly be inferred from these facts that the only business contemplated involved the development of the property. The subsequent sale represented no more than a disposition of the property after the development plan had been abandoned.

Malat v. *Riddell* does not deal with the situation, common to contemporary business, where a company regularly engages both in selling an item and in leasing or exhibiting the same item. In such a situation, the taxpayer is engaged in two businesses, and the existence of the second business does not change the character of the income of the first—the regular income of both businesses is taxable as ordinary income. See *Recordak Corp.* v. *United States*, 163 Ct. Cl. 294, 325 F. 2d 460; *American Can Co.* v. *Commissioner*, 317 F. 2d 604 (C.A. 2), certiorari denied, 375 U.S. 993;

Continental Can Co. v. *United States*, 422 F. 2d 405 (Ct. Cl.), taxpayer's petition for certiorari pending, No. 164, this Term.[4] Consequently, the distinctions drawn between a "substantial" and a "principal" purpose in *Malat* v. *Riddell* in the context of a single business do not afford a basis for treating the player contracts, found to have been regularly bought and sold to customers in one of petitioner's two businesses, as property entitled to nonrecognition treatment.

The findings of the Tax Court that petitioner engaged in regularly holding player contracts for sale to customers as part of its normal business operations (Pet. App. C40) are sufficient in this instance to support the conclusion that the contracts were property held primarily for sale to customers in the ordinary course of petitioner's trade or business. Cf. *Tomlinson* v. *Ducate*, 318 F. 2d 60 (C.A. 5). In bypassing the "primarily for sale" ground upon which the Tax Court principally relied, the Ninth Circuit appeared to assume that an asset may not be held primarily for sale if the fact that it is for sale is a matter of busi-

[4] As the Court of Claims stated in *Recordak*, *supra* (325 F. 2d, at 463), in such a setting—

> "primarily" invokes a contrast, not between selling and renting, but between selling in the ordinary course of business and selling outside of that normal course. Accordingly, if the entrepreneur holds out his wares either for sale or for rental, the taxation of his business gain from sales does not depend upon a comparison of sales to rentals in the particular year. *S.E.C. Corp.* v. *United States*, *supra*, 140 F. Supp. at 749. Regardless of that ratio, the goods are held "primarily for sale to customers in the ordinary course of * * * trade or business" because they are regularly offered for sale to customers as part of the normal operation of the enterprise. * * *

ness necessity. But the fact that petitioner may have held the contracts for sale because it was required to do so by the major leagues, rather than because it desired to do so, should make no difference. The only material question is whether the contracts were held for sale—not why. See *American Can Co.* v. *Commissioner, supra; Continental Can Co.* v. *United States, supra.* There can be no question on this record that the contracts were so held.

3. The decision below also may be supported under the tax benefit principle, as applied by this Court and other courts, the rationale of which is that if an item has previously served to offset ordinary income, its recoupment should be treated as a recovery of such income. *United States* v. *Skelly Oil Co.*, 394 U.S. 678, 686, n. 5; *Alice Phelan Sullivan Corp.* v. *United States*, 180 Ct. Cl. 659, 663–666, 381 F. 2d 399, 401–403; *O'Meara* v. *Commissioner*, 8 T.C. 622, 634–635. Petitioner took deductions against ordinary income for all costs of acquiring player contracts and training players. Under its own theory of the case (Pet. App. B36), the player contracts "were generally sold at a loss when all of the expense of acquisition and development of players sold is considered * * *." [5] Thus, the entire proceeds of the player contract sales constituted a recoupment of prior deductions against ordinary in-

[5] Contrary to petitioner's contention (Pet. 13–14), the excess of the sales proceeds of the player contracts ($117,000) over the cost of the contracts ($22,150) does not represent merely an appreciation in value accrued over a substantial period of time. By petitioner's own admission, the appreciation resulted at least in part because it expended funds to train the players, which it deducted from ordinary income.

come, which should be taxed as ordinary income.[6] Cf. *Arrowsmith* v. *Commissioner*, 344 U.S. 6.

Application of the tax benefit principle in these circumstances does not depend on a finding that the item sold falls literally within the exceptions to the nonrecognition rule of Section 337(a) that are set out in Section 337(b)(1). Although Section 337(b) does not specifically refer to the tax benefit principle, the courts have consistently recognized that "there is no provision in the statute showing an intent to alter or bar the application in cases under § 337 of tax benefit principles fashioned under other provisions of the Code." *Commissioner* v. *Anders*, 414 F. 2d 1283, 1287 (C.A. 10), certiorari denied, 396 U.S. 958; see also *West Seattle National Bank of Seattle* v. *Commissioner*, 288 F. 2d 47 (C.A. 9); *Citizens Federal S. & L. Ass'n of Cleveland* v. *United States*, 154 Ct. Cl. 305, 311–315, 290 F. 2d 932, 936–938; *Hallcraft Homes, Inc.* v. *Commissioner*, 336 F. 2d 701 (C.A. 9); 1 Mertens, *Law of Federal Income Taxation*, Sec. 7.34; Rev. Rul. 61–214, 1961–2 Cum. Bull. 60. Petitioner's sales of player contracts thus are subject to ordinary income treatment, whether or not the Tax Court was correct in concluding (Pet. App. C40) that the contracts were petitioner's stock in trade and were held principally for sale to customers in the ordinary course of its trade or business.

4. For the reasons stated above, the court of appeals need not have reached *Corn Products Co.* v.

[6] *Nash* v. *United States*, No. 678, 1969 Term, decided May 18, 1970, is not to the contrary. In that case, unlike this one, there was no "recovery" of the costs previously deducted from ordinary income.

Commissioner, 350 U.S. 46, in order to decide this case properly. However, its reliance on *Corn Products* in the particular circumstances of this case was entirely correct.

Section 1221(1) of the Code (Pet. 4), the substantially unchanged successor provision to Section 117 of the 1939 Code, excludes certain property from the definition of the term "capital asset." Section 337(b)(1)(A), in virtually identical language, excepts that property from the nonrecognition rule of Section 337(a). In *Corn Products*, this Court held that sales of corn futures by a manufacturer of corn products, which were made to insure against price increases in the raw materials used in the manufacturer's normal business operations, resulted in ordinary income rather than capital gain. The Court reasoned that although the futures may not have fallen within the literal language of any of the exclusions from the capital asset definition, the statutory language should not be so broadly applied (350 U.S. at p. 52)—

> as to defeat rather than further the purpose of Congress. *Burnet* v. *Harmel*, 287 U.S. 103, 108. Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss. The preferential treatment provided by § 117 applies to transactions in property which are not the normal source of business income. * * *

Petitioner here urges that its profits from player contract sales should not be recognized because the contracts did not fall within the essentially identical

literal exclusions of Section 337(b)(1)(A). Although Sections 1221 and 337 may not be parallel in every respect (see discussion, Pet. App. D56–D59; compare *Coast Coil Co.* v. *Commissioner*, 50 T.C. 528, affirmed *per curiam*, 422 F. 2d 402 (C.A. 9), and *Pridemark, Inc.* v. *Commissioner*, 345 F. 2d 35 (C.A. 4)), neither capital gains treatment nor nonrecognition is intended to be afforded to assets which are the subject of regular sales in a taxpayer's normal business operations. The court below thus did not err in relying on the rationale of *Corn Products* after finding (Pet. App. D62) that (1) the income plainly was of a nature which arose from normal business operations and (2) the player contracts were, in effect, the "raw material" or "stock in trade" of the business. This very limited and classic application of *Corn Products* does not extend its holding beyond its own facts—regular sales of assets in the course of a business which essentially represent the raw materials of that business—in *Corn Products*, the corn; in this case, the baseball players.

The issue here is to be contrasted with the question presented in *Waterman, Largen & Co.* v. *United States*, 189 Ct. Cl. 364, 419 F. 2d 845, and *Steadman* v. *Commissioner*, 424 F. 2d 1 (C.A. 6), in which we shall shortly file petitions for writs of certiorari. The question in the cited cases is whether, under the *Corn Products* rationale, a taxpayer which purchases the stock of a corporation, in order to retain the corporation as a client, is entitled to treat a loss on the sale or worthlessness of the stock as an ordinary loss. Unlike the instant case, which arises under Section 337, *Waterman*, *Largen* and *Steadman* involve the capital asset definition of Section 1221 (formerly Section 117), as did *Corn Products*. Moreover, the question raised in those cases has been the subject of a wide variance of opinion in the lower courts.

Petitioner argues (Pet. 14–15) that the application of the *Corn Products* doctrine to Section 1231 depreciable assets creates an issue worthy of this Court's review. But this question is extraneous to the facts here, since, under the method of accounting used by petitioner, the player contracts were not treated as depreciable assets, but rather as currently deductible expenses. Moreover, the question of the tax consequences on a sale of a depreciable asset—whether or not in connection with a Section 337 liquidation—has in large part been resolved by the enactment in 1962 of the recapture of depreciation provision now found in Section 1245 of the Code. That provision requires that gain on the sale of such property be treated as ordinary income to the extent of depreciation deductions previously taken. Apart from this, as the court of appeals observed (Pet. App. D55–56), application of the *Corn Products* doctrine to depreciable assets involves no great departure from *Corn Products* itself. It merely reflects the policy underlying both Sections 1221 and 1231, that preferential treatment is not to be accorded normal business profits and losses.

5. Finally, there is no conflict of decisions to warrant review by this Court. *Hillard* v. *Commissioner*, 281 F. 2d 279 (C.A. 5), and *Philber Equipment Corp.*

The issue here, on the other hand, arises on relatively unusual facts, and, as we have shown, the *Corn Products* principle is not critical to the outcome in any event.

The contention (Pet. 15) that the decision below has the effect of reading Sections 337 and 1231 out of the Code is without merit. Those provisions are fully applicable to sales or exchanges of property which do not result in a normal source of business income, and nothing in the decision below affects their proper operation.

v. Commissioner, 237 F. 2d 129 (C.A. 3), discussed by petitioner (Pet. 8–10), both involved sales of property—motor vehicles—by a taxpayer engaged in the vehicle leasing business. The courts, recognizing that the sales activities were merely part of the last phase of a cycle in the use of the vehicles—the replacement or sale of equipment no longer useful in the business—concluded that the vehicles were not held by the taxpayer primarily for sale to its customers in the ordinary course of business. In contrast, as we have shown, petitioner was engaged in two businesses. In its selling business, it held player contracts for sale to customers from the moment of their acquisition and indeed was required to do so. This is not a case of a disposal of players who were no longer fit to play baseball for petitioner's team, but one of regular sales in the normal course of business of petitioner's most valuable and highly skilled players.

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[1] Like *Hilliard* and *Philber Municipal Bond Corporation* v. *Commissioner*, 341 F. 2d 683 (C.A. 8) (Pet. 10), is not in conflict with the decision below. In that case, the court simply reaffirmed that "primarily for sale" means "principally" or "of first importance." Moreover, in none of these cases was *Corn Products* discussed or interpreted in a manner that conflicts with the decision of the Ninth Circuit here. As for the Court of Claims' decisions with which petitioner appears to assert conflict (Pet. 10), the court of appeals correctly pointed out (Pet. App. D53–D54) that in each of them the question whether *Corn Products* applies to Section 1231 assets was reserved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
THOMAS L. STAPLETON,
JANET R. SPRAGENS,
Attorneys.

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